TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 388.

N. O. MURPHY, C. H. AKERS, AND J. W. VICKERS; AND N. O. MURPHY, GOVERNOR; C. H. AKERS, SECRETARY, AND J. W. VICKERS, AUDITOR, OF THE TERRITORY OF ARIZONA, CONSTITUTING THE BOARD OF COMMISSIONERS, STYLED THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, APPELLANTS,

vs.

JAMES L. UTTER AND GEORGE ALBRIGHT, WESLEY ALBRIGHT, AND WILLIAM H. McGINNIS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELIZABETH B. VOORHIES, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 29, 1901.

(18,241.)

3100

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1 In the Supreme Court in and for the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of the Territory of Arizona, Defendants.

The plaintiffs petition the court and allege:—

That plaintiff James L. Utter resides at Oak Hill in the State of New York, and Elizabeth B. Voorhies resides in the city of New York in said State; and that defendants reside in the city of Phœnix, Arizona Territory and that they constitute and compose the loan commissioners of the Territory of Arizona, and are acting as such.

II.

That plaintiffs allege, that by virtue of the authority of the act of the Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad" approved February 21st, 1883, the County of Pima in said Territory did on the first day of July, A. D. 1883, issue its bonds, each for the sum of one thousand dollars, to the number of one hundred and fifty, and which said bonds are numbered consecutively 1 to 150
2 inclusive, and all of said bonds are in the same words and figures, of which the following is a copy, to wit:—

"One thousand dollars. UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.* One thousand dollars.

"The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Guage Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

"This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled 'An act to promote the construction of a certain railroad' approved by the governor thereof the 21st day of February A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

"In testimony whereof, the said county by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the said Pima

county, and the said clerk has affixed hereto the seal of said county, and the said recorder has affixed hereto the seal of said county recorder's office this first day of July A. D. 1883.

"JAMES H. TOOLE,
" *Chairman Board Supervisors.*
"CHAS. R. DRAKE,
" *County Recorder.* [SEAL.]
"WILLIAM J. ORBORN,
" *Clerk Board of Supervisors.* [SEAL.]"

And to each of said bonds were attached forty coupons numbered consecutively 1 to 40 inclusive, each for the sum of thirty-five dollars, and the first one became due January 1st, 1884
3 and the next one six months thereafter, and so on, one became due on the first day of January, and one the first day of July in each successive year, the last one on the first day of July A. D. 1903, and delivered the same with the coupons attached to the Arizona Narrow Guage Railroad Company as is provided for in said act, in exchange for a like number and denomination of bonds of that company with like coupons thereto attached.

And plaintiffs allege that the said railroad company, then the owner of said bonds sold the same in open market for a good and valuable consideration, and after divers sales and deliveries the plaintiffs for good and valuable consideration then and there paid, purchased the said bonds and all the coupons thereof, except the first seven, in open market, and the same were delivered to the plaintiffs who are now the owners of the same.

Plaintiffs allege that none of said bonds or the coupons attached thereto (except the first seven) have been paid, and the amount of the principal of each bond and matured coupons thereof, owned by plaintiffs July 1st, 1896, was $1,665.00 and on January 1st, 1897, the sum of $1,700.00. So that the total of principal and matured coupons July 1st, 1896 was $249,750.00 and on January 1st, 1897 is $255,000.00.

Plaintiffs allege that each of said coupons bear interest at
4 the rate of seven per cent. per annum from the date of maturity, aggregating an amount up to July 1st, 1896 of $34,964.50 and all aggregating, that is to say, principal, coupons and interest on coupons, on January 1st, 1897 the sum of $289,964.50.

Plaintiffs allege that by law it is the duty of defendants to provide for the redeeming and refunding of the said county indebtedness, and to issue bonds for said indebtedness in redemption of the said bonds, coupons and interest as aforesaid; and on the 12th day of December A. D. 1896 the plaintiffs made demand on the defendants that the defendants as loan commissioners of the Territory of Arizona issue bonds as provided by law in exchange for said bonds, coupons and interest as aforesaid. Which said demand was made in writing by serving on the defendants and causing to be filed with the clerk of said commission a paper in writing, a copy of which is herewith filed and made a part hereof and marked "Exhibit A."

And the plaintiffs allege that the defendants have failed and re-

fused hitherto to comply with said request and demand and hitherto and now refuse so to do. That plaintiffs have not a plain, speedy and adequate remedy in the ordinary *cause* of law.

Plaintiffs therefore pray that there issue out of this court an alternative writ of mandamus directing and requiring the de-
5 fendants acting as the loan commissioners of the Territory of Arizona to issue bonds in exchange for said indebtedness or show cause before said court why the peremptory writ of mandamus shall not issue commanding them to perform their said duty, and they pray for such other and further relief as the law may give them.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

W. H. Barnes being first duly sworn on oath states that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true in substance and in fact. He also states that he is the authorized agent of the plaintiffs in this behalf, and makes this affidavit for them.

W. H. BARNES.

Subscribed and sworn to before me this 24th day of December A. D. 1896.

JOHN H. MARTIN,
[SEAL.] *Notary Public, Pima County, A. T.*

(Endorsed:) No. 546. In the supreme court Territory of Arizona. James L. Utter and Elizabeth B. Voorhies, plaintiffs *vs.* Banjamin J. Franklin, C. P. Leitch and C. M. Bruce, loan commissioners of the Territory of Arizona, defendants. Petition. Filed Dec. 31, 1896. J. L. B. Alexander, clerk.

6 Whereas, by virtue of the authority of the act of the Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad" approved, February 21st, 1883, the County of Pima in said Territory did on the first day of July A. D. 1883, issue its bonds each for the sum of one thousand dollars, to the number of one hundred and fifty, numbered consecutively 1 to 150 inclusive, and all of said bonds are in the same words and figures, of which the following is a copy, viz:

One thousand dollars. UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.* One thousand dollars.

The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Guage Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States, with interest thereon at the rate of

seven per cent. per annum, said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled "An act to promote the construction of a certain railroad" passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In testimony whereof, the said county by its board of supervisors has caused this bond and the coupons hereto attached, to be
7 signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the said county of Pima, and the said clerk has affixed hereto the seal of said county, and the said recorder has affixed hereto the seal of said county recorder's office this first day of July A. D. 1883.

JAMES H. TOOLE,
Chairman Board Supervisors.
CHAS. R. DRAKE,
County Recorder. [SEAL.]

WILLIAM J. OSBORN,
Clerk Board of Supervisors. [SEAL.]

And to each of said bonds were attached forty coupons, numbered consecutively from 1 to 40, each for the sum of thirty-five dollars, and the first one became due January 1st, 1884, and the next one six months thereafter, and so on, one became due on the first day of January, and one the first day of July in each successive year, the last one on the first day of July, A. D. 1903.

And delivered the same with the coupons attached to the Arizona Narrow Guage Railroad Company as is provided for in said act.

And whereas, the said bonds and the interest coupons are now in the possession of, and the property of James L. Utter, who resides in Oak Hill, New York, and Elizabeth B. Voorhies, who resides in New York city, and who purchased the same in open market for good and valuable consideration by them paid to the then holders thereof.

And whereas, none of the said coupons attached to said bonds have been paid the whole of said bonds and all of the coupons attached, from coupons No. 8 to No. 27 inclusive is the amount
8 of principal and interest accrued up to January 1st, 1897 unpaid, viz: the sum of $1,700.00 on each of said one hundred and fifty bonds, making a total of $255,000.00 of principal and interest as aforesaid of the said bonds and said coupons — other evidences of indebtedness which were heretofore as aforesaid issued under the said authority of the legislature of Arizona, all of which said bonds

and coupons are here, and now offered for inspection by the loan commissioners.

And whereas, by act of Congress, entitled "An act amending and extending the provisions of an act of Congress entitled 'An act approving with amendments the funding act of Arizona, approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto,' approved August third eighteen hundred and ninety-four" approved June 6th, 1896—as follows:

Be it enacted, etc. That the provisions of the acts of Congress, approved June 25th, 1890 and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of the Territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded into the lower interest-bearing bonds as provided by this act.

SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress, approved June 25th, 1890, and the act amendatory thereof and supplemental thereto, approved August 3rd, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided, until January 1st, 1897; provided, that nothing in this act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed and made valid and authorized to be funded.

Approved June 6, 1896.

And whereas, on the 12th day of December A. D. 1896 the undersigned made a demand in writing on the board of supervisors of the said county of Pima that they report to the loan commissoners of the Territory of Arizona the said outstanding bonds and indebtedness for the purpose of and that said loan commissioners may as by law they are required to do, provide for the redeeming or refunding of the county indebtedness aforesaid.

And whereas, the said board of supervisors of said county have hitherto failed to comply with said demand, and have failed hith-

erto to make said report, and have hitherto failed to make such demand on the loan commissioners of said Territory;

Now therefore, we the undersigned owners of said bonds
10 and coupons having purchased the same for good and valuable consideration, hereby and now, in writing demand that you, the said loan commissioners of the Territory of Arizona require an official report from the board of supervisors of said county of Pima of their bonded and outstanding indebtedness including the indebtedness aforesaid as evidenced by said bonds and coupons.

And we also demand that said loan commissioners shall provide for the redeeming or refunding of the said county indebtedness, notwithstanding the said board of supervisors have failed to do their duty as aforesaid, and shall issue bonds for said indebtedness in redemption of the same as required by law.

And we here and now, having said bonds and coupons in hand for inspection and delivery, show the same to said loan commissioners and offer to deliver the same in exchange for bonds of the Territory as provided by law, viz: section seven of the act of March 19th, 1891 of Arizona, of the Laws of 1891 page 123, as provided for by the act of Congress approved June 25th, 1890 aforesaid.

Dated, Phœnix, Arizona, December 14th A. D. 1896.

JAMES L. UTTER.
ELIZABETH B. VOORHIES.

To B. J. Franklin, governor, C. P. Leitch, auditor, C. M. Bruce, secretary of the Territory, loan commissioners of the Territory of Arizona.

11 W. H. BARNES,
JOHN H. MARTIN,
Attorneys for Petitioners.

(Endorsed:) No. 546. In the supreme court Territory of Arizona. James L. Utter and Elizabeth B. Voorhies, plaintiffs *vs.* Benjamin J. Franklin, C. P. Leitch and C. M. Bruce, loan commissioners of the Territory of Arizona, defendants. Plaintiffs' "Exhibit A." A duplicate of the within filed in the office of the secretary of the loan commission of Arizona this 14th day of December, 1896. Alfred Franklin, secretary of loan commission. Filed Dec. 31, 1896. J. L. B. Alexander, clerk.

12 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH VOORHIES, Plaintiffs, *vs.* BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of Arizona, Defendants.	Answer and Response to Writ.

The defendants named in the above-named cause come, and, for answer to the complaint and petition for mandamus herein say:

First.

They except to the sufficiency of the said petition herein, and demur thereto for the following reasons to wit:

1. Because the said complaint and petition fails to state facts sufficient to constitute a cause of action, and therefore mandamus in this action will not lie.

2. Because said petition seeks to compel the funding of bonds that were issued contrary to law, and in violation of the grant of powers given territorial legislatures by the laws of the Congress of the United States.

3. Because the said petition seeks to compel the funding of bonds heretofore declared void by this court, and by the Supreme Court of the United States, all of which this court judicially knows.

Wherefore defendants pray judgment.

13 Second.

For a further and second defense herein, defendants aver, and give the court to know that the said bonds herein declared on in this action, and for the funding of which this suit is brought to compel, are the same identical bonds that were involved in the suit in which —— Lewis was plaintiff, and The County of Pima in the Territory of Arizona was defendant, in which suit was brought on 2,250 coupons of said bonds in the district court of the said county of Pima and which were attached to these same bonds,—and in which suit these same bonds were placed in issue and the payment of which, together with the said coupons, was resisted on the grounds that the said bonds were issued contrary to, and in violation of law, and that the same were therefore void;—and that the same, and each and all of the said bonds were, in said action, each and every one of the same together with the said coupons thereto attached, by the judgment of the said court, after due deliberation, in open court adjudged to be void and of no binding force and obligation on the said county of Pima;—and that the said action was by appeal carried from said court to the supreme court of the Territory of Arizona, and was there on the 14th of April 1893, by said supreme court, affirmed, and the said bonds and the said coupons thereto attached were again, and by that court declared void and of no binding effect on the said county of Pima.

14 That an appeal was taken from the said decision of the said supreme court of the Territory of Arizona, to the Supreme Court of the United States, and in that court, at the October term of the same 1894, these same identical bonds were declared void and of no binding force and effect against the said county of Pima. Therefore defendants say and plead *res adjudicata*, and that therefore this action cannot be maintained.

Wherefore defendants pray the court that plaintiffs take nothing by this action, that their petition be dismissed, and that defendants

go hence without day, and have all of their costs in and about this action expended, and for all general relief.

B. J. FRANKLIN,
C. P. LEITCH, AND
C. M. BRUCE, *and*
Loan Commissioners & Defendants,
By the Attorney General.

(Endorsed:) No. 546. James L. Utter and Elizabeth Voorhies *vs.* B. J. Franklin *et al.* loan commissioners. Answer & response. Filed Jan'y 19, 1897. J. L. B. Alexander, clerk.

15 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH VOORHEIS, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of Arizona, Defendants.

And now comes the said plaintiffs, by Barnes & Martin, their attorneys, and to the said second defense of the said defendants in cause heretofore filed, and demur and say: that the same does not state facts sufficient to constitute any defense to said cause; nor does the same show any cause or reason why the writ of mandamus prayed for in this cause should not issue; and they therefore pray that the said writ do issue as prayed for, notwithstanding the said defense set up in said second answer.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter and Elizabeth Voorheis, plaintiffs *vs.* Benjamin J. Franklin, C. P. Leitch, and C. M. Bruce, loan commissioners of Arizona, defendants. Demurrer to answer. Filed January 19, 1897, J. L. B. Alexander, clerk.

16 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Petitioners,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Respondents.

I.

Comes the respondents and present this their first amended return and say: That the Legislative Assembly of the Territory of Arizona passed a certain act which was approved February 21st, 1883, wherein and whereby Pima county, in the Territory of Arizona, was commanded to make certain bonds, with interest coupons thereunto attached, the same being the bonds and coupons specified in the peti-

tioners' petition herein; that after the passage and approval of said act, certain persons interested in the issue of said bonds and coupons, demanded that said county should make and execute the same, and that in default thereof that they would be prosecuted under said act for failure so to do; that the defendants, The Board of Supervisors of said County, then believing that they had no option or discretion in the matter, and in obedience to said legislative command, did make said bonds and coupons, and cause the same
17 to be signed by its officers; that, not wishing or intending to deliver the said bonds or coupons until compelled so to do by a decree and command of a court having jurisdiction in the premises, — delivered said bonds and coupons to its treasurer in escrow, that is to say, that it instructed its said treasurer to deposit said bonds and coupons in the treasurer's vault of said county for safe keeping; that he should not, under any circumstances, not by virtue of any pretense whatsoever, deliver said bonds and coupons, or any thereof, to any person or persons, corporation or corporations whomsoever or whatsoever; but that, on the contrary thereof, he should safely and securely keep said bonds and coupons and each and all thereof, subject only to the order of the said board of supervisors of said county. That said treasurer did thereupon receive said bonds and coupons and all thereof, as aforesaid, and did deposit the same in his said treasurer's vault, and did then and there faithfully promise said county, that he would safely and securely keep said bonds and coupons and all thereof, and would only part with the possession of same and would only deliver the same on the order of the said board of supervisors.

And your respondents further allege that, afterwards, and without the knowledge or consent of the said board of supervisors or of said county, said treasurer did turn over said bonds to some per-
18 son or persons unknown to said county and to said board of supervisors; that said act of said treasurer in turning over and delivering said bonds and coupons was against the positive instructions, wish and will of said county, and of said board of supervisors, as *as* aforesaid, and was in violation of said instructions to said treasurer, and of his said promise as aforesaid. That said county nor said board of supervisors knew that said treasurer had turned over said bonds as aforesaid, until a long time after the same had been done; that said county, upon learning of the delivery of the said bonds and coupons as aforesaid, did at once all things in its power to discover where said bonds and coupons were, and in whose possession the same were, and to regain the possession thereof, but failed so to do; that said county never, in any way, nor to any extent, ratified such fraudulent and unauthorized delivery, either by the acknowledgement of the validity thereof or the payment of any interest thereon; but on the contrary thereof, always asserted that said bonds had not been delivered, were not the bonds of said county, and that said county would not pay the same, or any part thereof. Wherefore and by reason of the premises, as aforesaid, your respondents allege that said bonds and coupons were never delivered and are not now the bonds and coupons of said county.

II.

And for a further return, respondents allege: that said
19 bonds and coupons were printed and signed as aforesaid, in obedience to the said legislative command so to do, as aforesaid; that the same were designed by said legislative enactment to aid in the construction, equipment and operation of a certain line of railway running from the city of Tucson in said county to the town of Globe in the county of Gila, Territory of Arizona; that said line of railway was never constructed, equipped or operated; that said Arizona Narrow Gauge Railroad Company, to whom and in aid of which said bonds were commanded to be made and delivered, as aforesaid, was, at the time of the passage and approval of said legislative enactment, only a paper railroad; that said corporation was without means, credit or property; that its promoters, owners and representatives were without means, influence or reputation as monied or business men; and that whatever the intentions of said corporation or its said owners and promoters may have been, they were wholly unable to build, equip and operate said road; that for said bonds said county received no consideration whatsoever; that said railroad corporation has been abandoned for many years, and has not for many years been kept alive; that it did not and has not built nor operated said line of railway; that from the time of the receipt of the said bonds so fraudulently obtained, as aforesaid, said corporation has not existed save on paper; and that said bonds and coupons so made and signed by said county are void in law
20 and in equity; that at the time of the passage of the act of Congress that is alleged by petitioners to have validated said bonds and coupons, said railroad corporation had not existed in fact or in law for many years; that it had not constructed or operated its said line of railway; and that it was of no value whatever to the people of said Pima county; and that said bonds are not now, and have never been, outstanding obligations of said county.

III.

And for a further return, respondents allege: that heretofore, to wit: at the September term, 1891, of the district court of the first judicial district of the Territory of Arizona, sitting for the county of Pima, one Charles Edward Lewis brought his suit on the coupons that had then matured that were cut from said bonds, and all thereof, alleging in said suit that he was then the sole and only owner thereof; that he had purchased same in open market and for a valuable consideration; that said suit was brought against said county, and judgment was therein demanded against said county for the aggregate amount of said coupons then matured, together with interest thereon; that to said suit said county appeared and filed its answer thereto, among others, a demurrer, wherein and whereby, an issue of law was made, namely, that said bonds were not the
21 bonds of said county, for the reason that the said legislative enactment, in obedience to which the same had been made and signed, as aforesaid, was void, was contrary to the organic act

and said legislature had no authority whatsoever to enact the same; and that by reason thereof, said bonds and coupons had been made without any authority so to do, and were not therefore, the bonds and coupons of said county. That for the reasons aforesaid, the said district court sustained said demurrer and rendered judgment thereon in favor of said county; whereupon the said Lewis appealed said case to the supreme court of the Territory of Arizona, which said court thereafter affirmed the said judgment of the said district court; and that from said last judgment said Lewis again appealed said case to the Supreme Court of the United States. That said last-named court, after full consideration, held, in effect, that said bonds and coupons were wholly void, and for the reasons aforesaid, and by its judgment on said appeal, in all things affirmed the judgment of the said district court, and said respondents do now here plead said judgment as *res judicata*, as a finality to said bonds, as a bar to any and all present and future action on said coupons and bonds and both of them and as a defense thereto, in which respondents, and the said county, have acquired and now have a vested right, which cannot be in any way, nor to any extent divested, nor in any way nor to any extent taken away, either by the Congress of the United
22 States or by the Legislative Assembly of the Territory of Arizona.

IV.

And for a further return respondents allege: that heretofore, to wit: at the September term, 1891, of the district court of the first judicial district of the Territory of Arizona, sitting for the county of Pima, one Charles Edward Lewis, brought his suit on the coupons cut from said bonds specified and described in the petition of petitioners herein, and all of said coupons, alleging therein that he was then the sole owner of said bonds and coupons, and of all thereof; that he had purchased the same in open market and for a valuable consideration, and demanded judgment against said county for the aggregate amount of said coupons that had been matured, and for interest thereon; that in and to said suit said county appeared and filed its answer thereto, wherein and whereby, defendant first demurred to the complaint of the said Lewis, alleging as grounds for said demurrer, among others, that said complaint failed to state facts sufficient to constitute a cause of action; that said complaint failed to show that any part or portion of the line of railroad of the Arizona Narrow Gauge railroad was ever constructed or operated, or intended to be constructed or operated, or that the same is, was or was ever intended to be of any public utility, or in any sense to subserve a public use; that nothing is stated nor shown in
23 said complaint that the conditions precedent in said pretended legislative enactment contained, upon the happening of which the said treasurer of said county was attempted to be commanded by said legislative enactment to deliver said bonds in said complaint described, were in any way, nor to any extent, complied with, for that said treasurer ever delivered said bonds and coupons to any one; that said pretended act of the legislature is a manda-

tory command upon said county, and as such it is not a rightful subject of legislation, is *ultra vires* and void; that said pretended act of the legislature confers upon the Narrow Gauge Railroad Company, a corporation, an especial privilege that was, at that time, and from thence hitherto, as having been expressly forbidden by the organic act of said Territory; and that said legislature had no authority, and was without authority to pass said enactment, commanding and making an issue of said bonds and coupons, that by reason thereof said legislative enactment is void, and no authority exists, either at law or in fact, for the making or issuance of said bonds and coupons, and the same is therefore void.

That said county did, further, in its said answer to the said complaint, set up and allege each and all of the facts heretofore herein alleged, that said bonds and coupons, as aforesaid, had never been delivered by said county, to any person or persons, corporation or corporations, whatsoever or whomsoever; but that, on the
24 contrary thereof, the same had been delivered to the treasurer of said county, in escrow only, for safe keeping, and to be by said treasurer delivered only upon the order of the board of supervisors of said county; that said treasurer had, thereafter, and without the authority or knowledge and against the wish and will of said county, and of said board of supervisors, delivered said bonds and coupons to some person or persons, corporation or corporations, unknown to said county; that the delivery of said bonds was not made by the said treasurer, and was unknown to said treasurer until long after said delivery; that the said bonds and coupons were, by some person or persons, unknown to said county, and unknown to said board of supervisors, and without any right or authority so to do, abstracted from the said treasurer's vault in which the same had been placed by said treasurer for safe keeping.

That in and by said answer, the said county did set up and allege further as a defense thereto, that said act of the Legislative Assembly of the Territory of Arizona, commanding said county to make and deliver the bonds of said county to the said Arizona Narrow Gauge Railroad Company, in exchange for the bonds of said company, for an equal amount, had been enacted upon the belief that said company would build and operate a line of railway within the Territory of Arizona, and that thereby, the aid extended to said railroad corporation would be aid extended to a public way, and would be a
25 benefit to the residents; that unless said railway was built and operated it would not and could not be a public way, nor could the said aid in said case be extended to anything that could, in any way, nor to any extent, be of any public use or utility; that if said line of railway should not be built and operated, then the aid so commanded to be extended to it, as aforesaid, would be aid extended to a private use only, and as such the said legislative enactment would be wholly void; that by reason thereof the said county alleged in said answer that the said act of the Legislative Assembly of the Territory of Arizona, contained, by necessary implication, the proviso that said line of railway should be a public way, should be constructed and should be operated; and that such proviso and condi-

tion was and is a necessary condition precedent to the validity of said enactment and to the validity of the bonds and coupons made and issued, as aforesaid, the same being the bonds and coupons specified and described herein; that said line of railway was never built and was never operated, and that thereby and by reason thereof, no consideration whatsoever was ever received by said Pima county, for and on account of said bonds and coupons.

And said county did, in said answer, and as a defense to said suit, further allege that the said legislative enactment, by reason of which said bonds and coupons were made, as aforesaid, commanding
26 said county to make and deliver the same whether it wished to or not, *and* did not vest any, nor leave to said county any discretion whatsoever, whether it should make and deliver the same or not; and that said bonds and coupons, and each and all thereof, were made by said county in obedience to said legislative command, and for no other reason or cause whatsoever; that by reason thereof, no contract existed between said county and the said Arizona Narrow Gauge Railroad Company, to make and to deliver said bonds, or any thereof, unto said company, nor to its order; that said bonds and coupons were made by said county, as aforesaid, after the thirtieth day of July, 1886, at which time said legislative enactment was repealed and made void by the act of the Congress of the United States approved on said day, and known as "the Harrison act;" that said Harrison act repealed and nullified the said act of the legislature of the Territory of Arizona, commanding and making the issuance of said bonds and coupons, and for the reason that the indebtedness of said Pima county exceeded four per cent. of the assessed valuation of its said property, as assessed and equalized for the preceding year.

And respondents further allege that after the filing of the said answer, and after setting up therein the defenses and facts aforesaid, and after the decision of the said courts on said demurrer, as aforesaid, the petitioners herein obtained the possession, if they
27 ever did obtain the possession, of said bonds and coupons, and that by reason of the premises aforesaid their possession of said bonds and coupons was obtained with full notice of each and all of the defenses thereto, and with full notice of each and all of the said infirmities of said bonds and coupons, and that they took and received the same with full notice thereof; wherefore, and by reason of the premises aforesaid, your respondents allege, that said petitioners are not innocent holders of said bonds and coupons, or of any thereof, but on the contrary thereof, took and received same with full notice of the matters and things aforesaid.

And so your petitioners say, that said bonds and coupons were not "sold or exchanged in good faith, and in compliance of the act of the legislature by which they were authorized;" and that by reason thereof, said bonds and coupons, nor any thereof, have ever been authorized by any legislative enactments of the Territory of Arizona, or of the Congress of the United States, to be funded.

V.

And these respondents for a further return allege: That the so-called validating act of the Congress of the United States passed June 6th, 1896, nor any other enactment of the Congress of the United States, nor any enactment of the Legislative Assembly of the
28 Territory of Arizona, included, or to any extent, validated any of said bonds or coupons; that said act of Congress so passed pursuant to a memorial of the Legislative Assembly of the Territory of Arizona, asking that certain bonds and coupons issue-by certain of the counties of the said Territory, in aid of railroads, which had been sold in open market, which were held in good faith, the validity of which "for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due"; that the validity thereof was thereafter questioned, and to the end that such validity might be set at rest, Congress was asked to validate said bonds; that the bonds referred to in and by said memorial were the railway aid bonds issued by the counties of Yavapai and Maricopa in said Territory; that bonds had been issued by said Yavapai county in aid of the construction and operation of a certain line of railway in said county; that said railway pursuant to said contract was constructed and operated; that the bonds of said Yavapai county in aid thereof, were made and delivered to the said railroad company, and that, by means thereof a line of railway was constructed and operated, as aforesaid; that said Yavapai county, for many years paid the interest on said bonds as the same matured; that the said county of Maricopa issued its bonds in aid of a line of railway to be constructed in said county; that said line of railway was constructed and operated, pursuant to said contract; that the said bonds were by said
29 county delivered to the said railway company, and for many years thereafter, and since said time, has paid the interest thereon as the same accrued; that the said bonds and coupons made by Pima county, as heretofore herein specified, were not made by the wish, nor by the will of said Pima county, for the reason that the said The Arizona Narrow Gauge Railroad Company was wholly insolvent and had no means or credit, whereby and wherewith it could construct its line of railway, and that said county did not believe that it could, or would ever construct said line of railway, nor operate the same; and that, because of the command in said legislative enactment contained, wherein and whereby said Pima county was commanded to make said bonds and coupons, the same were made as aforesaid, and for no other reason whatsoever; that said line of railway was not constructed, nor was it operated; and that said Pima county never paid the interest thereon; that after the opinion in this case rendered by the Supreme Court of the United States, at its October term, 1898, the Twentieth Legislative Assembly of the Territory of Arizona, then being duly in session, by a great and overwhelming majority, adopted another memorial to the Congress of the United States, the same being known as House Memorial Number One, and the same being in words and figures as follows, to wit:

House Memorial No. 1.

To the Senate and House of Representatives of the United
30 States of America in Congress assembled:

Your memorialists, the Legislative Assembly of the Territory of Arizona, beg leave to submit to your honorable body, that,

Whereas, a memorial was presented to your honorable bodies by Eighteenth Legislative Assembly of the Territory of Arizona regarding bonds issued by certain counties of said Territory, which memorial was intended to apply only to such bonds as had been bought in good faith, and interest on which had been paid as stated in aforesaid memorial; and

Whereas, in response to said memorial your honorable bodies thereafter passed the act entitled "An act amending and extending the provisions of an act of Congress entitled An act approving, with amendments, the funding act of Arizona, approved June 6th, 1898; and

Whereas, based on said memorial an- act of June 6th, 1896, the Supreme Court of the United States has recently rendered a decision tending to recognize the validity of certain bonds issued by Pima county, Arizona Territory, to the Arizona Narrow Gauge railroad, under the provisions of the act of the Legislative Assembly of the Territory of Arizona, approved February 1st, 1883, and,

Whereas, before the passage of said memorial said bonds had been declared unauthorized and void by the district court of the first judicial district of the Territory of Arizona, in and for Pima county, by the supreme court of the Territory of Arizona, and by the Supreme Court of the United States, in the case of Lewis *vs.* The County of Pima, decided in the Supreme Court of the United States at its October, 1894, term; and

Whereas, said bonds issued to said Arizona Narrow Gauge Railroad Company were never acquired by said county in good faith, and were never sold by it in good faith or for a valuable consideration, and none of the interest on said bonds had ever been paid by Pima county, and the validity of said bonds had never been acknowledged by said county, and,

Whereas, the said Arizona Narrow Gauge railroad was never built and never existed, and Pima county has never received any consideration whatever for the said so-called bonds, and the entire scheme of the said bond issue was a fraud without any element of merit or good faith, and

Whereas, all the foregoing facts were and are notorious, and within the knowledge of every one who has had any dealings with said bonds, and

Whereas, it was by all the members of the legislature passing said memorial and by the governor of Arizona at the time,
31 and by the then delegate in Congress from Arizona, believed that all of said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company were *res adjudicate* by the said decision of the Supreme Court of the United States, and that none of the said bonds could be thereafter validated, and

Whereas, said memorial was intended to apply only to certain railway aid bonds of two other counties in Arizona where the aided railways were actually constructed, and not to the said bonds so issued by Pima county, as to which none of the statements or reasons in said memorial applied, and which bonds were then as now believed to be without consideration, unjust, fraudulent and void.

Therefore, we most strongly urge upon the Senate and House of Representatives of the United States of America to pass such legislation as will exclude from the provisions of the act of Congress of June 6th, 1896, and from any and all other legislation by Congress the said bonds so issued by Pima county to the Arizona Narrow Gauge Railroad Company, so that neither said act of June 6th, 1896, or any other act will be construed so as to validate the said bonds issued by Pima county; and it is further

Resolved, That our delegate to Congress be and is hereby instructed to use all proper means to bring this subject to the careful and immediate consideration of Congress, in order to secure, if possible, from Congress such legislation as is prayed for herein, and that the secretary of the Territory be and he is hereby requested to transmit a copy of the foregoing memorial to each house of Congress and to our delegate to Congress."

And your respondents allege, that by reason of the premises aforesaid, the said bonds and coupons are not nor never were outstanding bonds of Pima county; that the said legislative command of said Territory that they be made and issued was without authority of law.

VI.

And respondents for a further return allege: That all of said coupons attached to said bonds that matured and became due
32 and payable more than five years next previous to the commencement of this action are barred by the statute of limitations in such case made and provided, and as to such coupons, and each thereof, your respondents hereby plead such statute of limitations hereto and in bar thereof.

VII.

And for a further return your respondents allege: That the said defendants, nor any nor either of them do now constitute the loan commission of the Territory of Arizona; that the said B. J. Franklin has long since departed this life, that the said C. M. Bruce is now a resident of the city of San Francisco in the State of California and that the said C. P. Leitch is not now, nor has been for more than a year last past, the auditor of said Territory; that said petition for a mandate asks that said mandate shall go against said B. J. Franklin, the said C. P. Leitch and the said C. M. Bruce in their individual capacity, and as members of the loan commission of said Territory; and for the reasons aforesaid, said individuals have not now the legal authority, nor power, to obey any mandate to them issued.

VIII.

And for a further return respondents allege: That the Twentieth Legislative Assemby of the Territory of Arizona, by an enactment duly passed, did repeal the loan commission of the Territory of Arizona, and that thereafter no loan commission exists, nor does
33 now exist, and there is now no power in the Territory of Arizona whereby said bonds can be funded, and that by reason of the premises the said petitioners are relegated to their action at law on said bonds.

IX.

And for a further return these respondents allege: That the said Pima county does not wish to fund said bonds and coupons, nor any thereof; and for the reason that if said bonds are funded, a new contract is thereby created, wherein and whereby said alleged indebtedness will not mature for fifty years next ensuing; and that said county, while your respondents constituted the loan commission of the Territory of Arizona, did officially notify said loan commission that it would not enter into such new contract, and would not consent to the funding of the said bonds, and did instruct said loan commission not to fund said bonds, and for the reason that, in funding said bonds, a new contract would be made to which said Pima county was not a party and would not be a party.

X.

And for further return respondents allege: That none of the bonds and coupons claimed to be owned by plaintiffs or either of them were sold or exchanged in good faith in accordance with the act of the Territory of Arizona under which they were issued, and defendants deny that plaintiffs, or either of them are holders or owners,
34 in good faith, and for a valuable consideration before maturity and without notice of any of said bonds or coupons.

XI.

And defendants further aver that heretofore, to wit, on November 23, 1882, the Arizona Narrow Gauge Railroad Company filed its original articles of association in the office of the secretary of the Territory of Arizona; that said articles were under the provisions of the laws of Arizona Territory relative to the incorporation of railroad companies, and that such articles contained, among other things the following statements and recitals:

"We, the undersigned residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad and corporation act of Arizona Territory, approved February 14th, 1879 for the purpose of constructing, owning and maintaining railroads between the terminii and over the route described as follows:

The line begins at Tucson, Pima county, Territory of Arizona, thence, by the most favorable route in a northerly direction to a pass through the Tortilita mountains; thence in a northerly
35 direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley; thence in a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth parallel of north latitude, all of said line passing into and through the counties of Pima, Pinal, Graham Gila and Apache, of the Territory of Arizona, and the aggregate length of said railroad being about two hundred and ten miles."

That in said articles of incorporation were the subscriptions of eleven persons each in the amount of twenty thousand dollars to the capital stock of said proposed railroad, and that said articles also contain the following:

"Estimate of actual cost of constructing a railroad of three feet guage along the line set forth in the foregoing articles of association, together with the cost of right of way, motive power, depots, and stations, rolling stock, and other appurtenances and things for the completion and running of the road.

Estimate per Mile.

Right of way, station grounds and buildings	$300.00
Motive power	250.00
Cars of all kinds	210.00
Rails, fastenings and track-laying	6,300.00
Ties 2,640 per mile	1,300.00
Grading and bridging	5,100.00
Incidental and miscellaneous	400.00
Total cost per mile	13,860.00
Total cost of 210 miles	2,910,600.00

36 I, John P. Culver, hereby certify that I am a civil engineer by occupation and profession; that I have had examined the line of the road hereinbefore proposed and set forth, and have estimated the actual and contemplated cost of construction of said road, together with the cost of right of way, motive power, and every other appurtenance and thing for the completion and running of said road, and the actual contemplated cost as nearly as can be estimated is the sum of $2,910,600.00.

JNO. P. CULVER."

Defendants further aver that the said Arizona Narrow Gauge Railroad Company was the same Arizona Narrow Gauge Railroad Company referred to in act number 35 of the Twelfth Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad."

XII.

Defendants further aver that before the time when any bonds of Pima county could lawfully be exchanged in good faith under the provisions of said act number 35, the bonds of Pima county being the same bonds claimed to be owned by plaintiffs herein, were by the agents of said Arizona Narrow Gauge Railroad Company wrongfully and without the order or consent of the board of supervisors of Pima county, abstracted from the possession of the treasurer of Pima county, who was holding said bonds and all of
37 them for safe keeping until a time when said bonds could lawfully and in good faith be delivered and exchanged, and that in lieu of said Pima County bonds one hundred and fifty bonds of the Arizona Narrow Gauge Railroad Company, each payable to Pima county or bearer, each in the sum of one thousand dollars, each dated ——, 1883, and each having interest coupons payable semi-annually attached thereto were left in the office of said treasurer of Pima county; and defendants further aver that said bonds of said Arizona Narrow Gauge Railroad Company are identical in amount, date and time of payment of principal and coupons with the bonds of Pima county claimed to be owned by plaintiffs herein.

XIII.

Defendants further aver that said Arizona Narrow Gauge Railroad Company is, and at all the times herein mentioned, was insolvent, and that the said company never built or operated any *any* part of the railroad proposed to be built and operated according to its said articles of incorporation, or any railroad, whatever, and that immediately after coming into possession of the bonds of Pima county claimed to be owned by plaintiffs herein it ceased all operations and business and pretense of doing business, and defendants aver that the bonds and coupons and all of them of said Arizona Narrow Gauge Railroad Company are and at all times have been worthless and without any value whatever, that immediately
38 upon being informed of the fact that the bonds of Pima county had come into the possession of the said railroad company the board of supervisors of Pima county used all their efforts within their power to recover possession of said bonds, and declined and refused to pay any interest on same and that no interest on said bonds was ever paid by said Pima county, and that said Arizona Narrow Gauge Railroad Company cannot now and never could perform its obligation to build said railroad or any part of it, and defendants aver that there is a total want of consideration for the said bonds and coupons and all of them claimed to be owned by plaintiffs herein, and a total failure of the consideration for said bonds and coupons and all of them.

XIV.

Defendants further aver that none of the said bonds and coupons of Pima county were negotiated or transferred by said Arizona Narrow Gauge Railroad Company till many years after the said rail-

road company had ceased to do any business of any sort and many years after the consideration for the bonds of said Pima county had wholly failed as aforesaid, and defendants aver that the original transferees of said bonds and coupons and all subsequent holders thereof and the plaintiffs and each of them herein had notice and knowledge prior to any transfer of said bonds and coupons of said Arizona Narrow Gauge Railroad Company of the purported con-
39 sideration of said bonds and of the insolvency of said railroad company and of the fact that it had not built and could not build the said railroad or any part thereof proposed by it to be built, and of the fact that the purpose of building said railroad had long prior thereto been abandoned and that all said transferees and holders of said bonds and coupons of said Pima county had notice and knowledge prior to any such transfer of same of the want of consideration and total failure of consideration of all of said bonds and coupons and knowledge and notice prior to any transfer of said bonds and coupons of all the facts herein set out and alleged.

XVI.

Defendants further aver that the cause of action on the coupons claimed to be owned by plaintiffs herein was not commenced and prosecuted within five years after the cause of action accrued, and defendants plead the statute of limitations of the Territory of Arizona to wit paragraph 2314, and the amendments thereto of the Revised Statutes of the Territory of Arizona, 1887.

XVII.

And for a further defense thereo defendants plead as a counter-claim or set-off the said bonds and coupons of the said Arizona Narrow Gauge Railroad Company hereinbefore set out and described,
40 and defendants aver that none of the said bonds or coupons have been paid, but that the same and all thereof are now due the said Pima county, so far as the same have matured and are unpaid.

Wherefor- defendants pray that they go hence with their costs.

ROCHESTER FORD,
C. W. WRIGHT,
Attornies for Respondents.

TERRITORY OF ARIZONA, } ss:
Pima County, }

M. G. Samaniego being by me first duly sworn on his oath says: That he is the chairman of the board of supervisors of said county; that affiant has carefully read the above and foregoing return and answer and knows well the contents thereof; and that same is true in substance and in fact of his own knowledge, save as to the matters and things therein stated on information and belief, and as to those matters affiant believes them to be true.

M. G. SAMANIEGO.

Subscribed and sworn to before me this 31st day of May, 1899.

[SEAL.] S. E. HAZZARD,
Notary Public.

My commission expires Sept. 30, 1901.

(Endorsed:) No. 546. In the supreme court. James L. Utter, *et al. vs.* B. J. Franklin, *et als.* Amended return. Copy of the within answer and return served on me this May 31st, 1899. Barnes, att'ys for petitioners. Filed June 1st, 1899. Lloyd Johnston, clerk.

41 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

To the attorney general of the Territory of Arizona:

You will take notice that on the first day of the next sitting of the supreme court of Arizona, or as soon thereafter as we can be heard, the petitioners will move the court to note the suggestion of the death of Elizabeth B. Voorhies one of the petitioners herein, and to substitute the names of George Albright, Wesley Albright, and William H. Maginnis, executors of the last will and testament of said deceased, in place of the said deceased, and that the cause hereafter proceed in the name of said *said* Utter and the said executors as petitioners, in accordance with the mandate of the Supreme Court of the United States, wherein said substitution has been heretofore made.

And that the said petitioners will at the same time and place also move the court for an order and decree directing the issuance of the mandamus prayed for in the petition herein, in execution of the mandate of the Supreme Court of the United States, to be directed to the Hon. Nathan O. Murphy, governor, the Hon. Charles
42 H. Akers, secretary of the Territory, and Hon. George W. Vickers, the auditor of said Territory, constituting said loan commissioners.

Very respectfully, BARNES & MARTIN,
Attorneys for Petitioners.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Service of within admitted this 27th day of May 1899 C. F. Ainsworth, att'y general. James L. Utter, *et al. vs.* Benjamin J. Franklin, *et al.* Motion to make new parties and issue mandamus. Filed June 1st, 1899. Lloyd Johnston, clerk.

43 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

And now comes the petitioners by Barnes & Martin, their attorneys, and move the court to strike from the files the so-styled first amended return herein for the following reasons, namely:

1. The same was filed without leave of the court.

2. By the decision mandate and opinion of the Supreme Court of the United States in this case no new defenses or "returns" can be considered by this court.

3. This court in obedience to the mandate opinion and decision of the Supreme Court of the United States has no power to do other than direct the issuance of the writ of mandamus as prayed for in the petition herein and execute the decision of the Supreme Court of the United States by ordering a proper writ in accordance with the issues heretofore herein joined and decided.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

(Endorsed:) No. 546. Utter *v.* Loan Com'rs. Mo. to strike. Service of the within admitted this 1st day of June 1899. C. F. Ainsworth, att'y general. Filed June 1st, 1899, Lloyd Johnston, clerk.

44 The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, that we having examined the records and files in the office of the surrogate of the county of New York, do find there remaining a certain record of the last will and testament of Elizabeth B. Voorhees deceased, together with the probate thereof and the letters testamentary granted thereon (said will having been duly admitted to probate as a will of real and personal property on the twenty-eighth day of February in the year one thousand eight hundred and ninety-eight) in the words and figures following, to wit:

[N. Y. Surrogate's Seal.]

I, Elizabeth B. Voorhees, of the city, county and State of New York, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this instrument to be my last will and testament, hereby revoking all former wills by me made.

First: I direct the payment, by my executors, hereinafter named, of all my just debts and funeral expenses.

Second: I direct that after my decease my body be interred in the Albright family burying plot at Dryden, in the State of New
45 York, where my father, mother and one of my sisters are buried.

Third: I give and bequeath unto my husband, Luther C.

Voorhees, the sum of five hundred dollars in cash; one picture of Lincoln and his cabinet, one picture of General Grant, and the following books, to wit: History of the American Revolution, in two volumes, Life of Lincoln in one volume, Life of General Grant, in two volumes, and Seward's Travels Around the World, in one volume; the said pictures and books being now in my residence, No. 51 West 42nd street, New York city. I also give and bequeath unto my said husband the furniture now in his bed-room, at my said residence, consisting of one bedstead, one bureau, one table, chairs, pictures and ornaments.

Fourth: I hereby declare that all the furniture now contained in the basement of my residence No. 51 West 42nd street, New York city, and also the bedstead, two bureaus, one chair and one table, now in the room occupied by my brother George Albright, at my said residence, belong to my husband, Luther C. Voorhees, he having bought and paid for the same.

Fifth: I give and bequeath to my brother, George Albright the sum of five hundred dollars in cash; one cabinet bookcase, now in the parlor of my said residence; all the furniture now in my own bed-room at my said residence, consisting of one bedstead, one bureau, one lounge, tables, chairs, pictures and ornaments; the
furniture, pictures and ornaments now contained in the room
46 occupied by him at my said residence, excepting the bedstead, two bureaus, one chair and one table, which belong to my husband, Luther C. Voorhees; and also the oil painting by William Livingston Anderson, now in the parlor of my said residence.

Sixth: I give and bequeath to my brother, Harrizon Albright, the sum of five hundred dollars in cash.

Seventh: I give and bequeath to my brother, Aaron Albright, the sum of five hundred dollars in cash.

Eighth: I give and bequeath to my brother, Wesley Albright, the sum of five hundred dollars in cash.

Ninth: I give and bequeath to my sister, Anna Maria Lacey, the sum of one thousand dollars in cash.

Tenth: I give and bequeath to my sister, Elmina Lord, the sum of one thousand dollars in cash.

Eleventh: I give and bequeath to my sister, Samantha Cantine, the sum of one thousand dollars in cash.

Twelfth: I give and bequeath to my niece, Minnie J. Cantine, daughter of the said Samantha Cantine, the sum of one thousand dollars in cash; also the black cabinet and the piano now in the parlor of my said residence, one oil painting of cats and one picture of a bird on its nest.

Thirteenth: I give and bequeath to my nephew, George W. Albright, the sum of five hundred dollars in cash.

Fourteenth: I give and bequeath to my nephew Elisha A. Lacey, the sum of five hundred dollars in cash.

47 Fifteenth: I give and bequeath to my said sister Samantha Cantine and my said niece, Minnie J. Cantine, all of my diamonds and laces, share and share alike.

Sixteenth: I give and bequeath my red and blue India shawl to my sister Elmina Lord, with the request that upon her death she bequeath the same to my sister Samantha Cantine, or my niece Minnie J. Cantine, or if neither shall be living, then to my brother George Albright; and my other large India shawl I give and bequeath to my niece Sarah Albright Snyder, with the like request.

Seventeenth: I give and bequeath all my wearing apparel, not hereinbefore specifically bequeathed, to my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, share and share alike.

Eighteenth: I give and bequeath all of my household furniture, not hereinbefore specifically bequeathed, including all silver, cutlery, dishes, linen and bedding, but excluding the chandeliers contained in my said residence, and also the sideboard and dining table now in the dining-room of my said residence, to my brother George Albright and my sister Samantha Cantine, share and share alike.

Nineteenth: I give and bequeath to Mrs. Carrie B. Land, of San Francisco, California, my ruby ring, and if she shall not be living at the time of my death, I give and bequeath the same to her then surviving daughters.

48 Twentieth: I direct that all the rest, residue and remainder of my estate, both real and personal, be sold and co-verted into cash by my executors, hereinafter named; and for that purpose I hereby expressly authorize and empower my said executors to sell and dispose of the same, or any part thereof, at public or private sale, and at such times and in such manner and for such sum or sums as to them, or a majority of them in the exercise of their best judgment, may seem most expedient; and to convey all or any part thereof: and I direct that my said executors shall then deduct and set aside from my said residuary estate the sum of three thousand dollars, and I give devise and bequeath the said sum of three thousand dollars to my said executors in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my husband Luther C. Voorhees, during his lifetime, and after his death, I give and bequeath the said sum of three thousand dollars, or the securities in which the same may then be invested, to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Almina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

49 Twenty-first: I direct that my said executors shall divide the balance or residue of my said residuary estate, remaining after the deduction of the said sum of three thousand dollars, into eight portions, and I give, devise and bequeath the same as follows to wit:

1. One of such eighth portions I give, devise and bequeath to my

said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses, to my brother George Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

2. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my brother Harrison Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

50 & 51

3. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my brother Aaron Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living. I give and bequeath the same to my brothers Harrison Albright and Wesley Alrbight, my sisters Anna Maria Lacey, Almina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

4. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my brother Wesley Albright, during his lifetime, and after his death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright and Aaron Albright, my sisters Anna Maria Lacey, Elmina Lord, and Samantha Cantine, and my niece Linnie J. Cantine, or such of them as may then be living, share and share alike.

52

5. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income

therefrom, after deducting all taxes and necessary expenses, to my sister Anna Maria Lacey, during her lifetime, and after her death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers Harrison Albright, Aaron Albright, and Wesley Albright, my sisters Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

6. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my sister Elmina Lord, during her lifetime, and after her death, I give and bequeath the said eighth portion to my brother George
53 Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

7. One of such eighth portions I give, devise, and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my sister Samantha Cantine, during her lifetime, and after her death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living, and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey and Elmina Lord, and my niece Minnie J. Cantine, or such of them as may then be living, share and share alike.

8. One of such eighth portions I give, devise and bequeath to my said executors, in trust, nevertheless, to invest and reinvest the same, and keep the same invested, in bonds secured by first mortgage on real estate, or other first-class securities, and to pay over the income therefrom, after deducting all taxes and necessary expenses, to my niece Minnie J. Cantine during her lifetime,
54 and after her death, I give and bequeath the said eighth portion to my brother George Albright, if he be then living and if he be not then living, I give and bequeath the same to my brothers Harrison Albright, Aaron Albright and Wesley Albright, and my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, or such of them as may then be living, share and share alike.

Twenty-second: Should any of the legacies herein lapse or fail for any reason, the same shall go to my brother George Albright, hereinbefore named, if living, and if not living, then to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my

niece Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-third: Should any of the trusts herein created, or attempted to be created, lapse or fail for any reason, then I give, devise and bequeath the property of such trust, or trusts or attempted trust or trusts, to my said brother George Albright, if living, and if not living, then to my brothers Harrison Albright, Aaron Albright and Wesley Albright, my sisters Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-fourth: Should any of the persons herein named as legatees or beneficiaries, contest the validity of this my last will
55 and testament, or of any portion thereof, or in any way attempt to have this my last will and testament, or any portion thereof, declared void, it is my will that such person or persons shall not receive any legacy, bequest, income or benefit whatever from my estate.

Lastly: I hereby nominate and appoint my brother George Albright, my husband Luther C. Voorhees and my brother Wesley Albright, executors of this my last will and testament, and trustees of the several trust estates hereinbefore created. I direct that no bonds be required of them for the faithful discharge of their duties as such, and in case either of them shall refuse or be unable to act as such, or shall die, or resign, then I nominate and appoint William H. Maginnis, counsellor-at-law, of the city, county and State of New York, executor and trustee hereunder in place of the one so refusing, or who is unable to act, or who dies or resigns, and I direct that no bond be required of him for the faithful discharge of his duties as such.

It is my wish and direction that neither of my said executors and trustees (including the said William H. Maginnis, in case he shall be appointed as hereinabove provided,) shall have power to act alone, but that at least two of them shall concur in any act done hereunder.

In witness whereof, I have hereunto subscribed my name to this my last will and testament, written on eleven pages of paper,
56 at the city of New York aforesaid, the 12th day of August eighteen hundred and ninety-seven.

ELIZABETH B. VOORHEES.

Subscribed by the testatrix, Elizabeth B. Voorhees, in the presence of each of us and at the same time declared by her to us to be her last will and testament, and thereupon we, at the request of the said testatrix, and in her presence, and in the presence of each other, signed our names hereto as witnesses this 12th day of August, 1897, at New York city.

MARY HERSHFIELD,
41 *E. 67th St., New York City.*
CAROLINE BOWNE,
274 *West 71st St., New York City.*

57 Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of ELIZABETH B. VOORHEES, Deceased, as a Will of Real and Personal Property.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Mary Hershfield of New York city, New York, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the applicant to prove said will, says: I was well acquainted with Elizabeth B. Voorhees, now deceased; I knew the above-named decedent for more than fourteen years before her death. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as her last will and testament, and bearing date the twelfth day of August in the year one thousand eight hundred and ninety-seven, was made by the decedent at the city of New York, on the twelfth day of August in the year one thousand eight hundred and ninety-seven, in the presence of myself and Caroline Bowne the other subscribing witness. At the time of such subscription the said decedent declared the said instrument so subscribed by her to be her last will and testament; and I thereupon signed my name as a witness at the end of said
58 instrument, at the request of said decedent, and in her presence.

The said decedent at the time of so executing said instrument, was upwards of the age of twenty-one years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said Caroline Bowne, the other subscribing witness, sign her name as a witness at the end of said will, and know that she did so at the request, and in the presence of said decedent.

MARY HERSHFIELD.

Witness sworn and examined before me this 28 day of February, 1898.

BENJ. A. JACKSON,
Assistant to the Surrogate, New York County.

59 Surrogate's Court, City and County of New York.

In the Matter of Proving the Last Will and Testament of ELIZABETH B. VOORHEES, Deceased, as a Will of Real and Personal Property.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Caroline Bowne, of 274 West 71st street, New York city, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the applicant to prove said will, says: I was well acquainted with Elizabeth B. Voorhees now deceased; I knew the above-named decedent for more than twenty years before her death. The subscription of the name of said decedent to the instrument

now shown to me and offered for probate as her last will and testament, and bearing date the twelfth day of August in the year one thousand eight hundred and ninety-seven, was made by the decedent at the city of New York, on the twelfth day of August in the year one thousand eight hundred and ninety-seven, in the presence of myself and Mrs. Mary Hershfield the other subscribing witness. At the time of such subscription the said decedent declared the
60 said instrument so subscribed by her to be her last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in her presence.

The said decedent at the time of so executing said instrument, was upwards of the age of twenty-one years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said Mrs. Mary Hirshfield, the other subscribing witness, sign her name as witness at the end of said will, and know that she did so at the request, and in the presence of said decedent.

CAROLINE BOWNE.

Witness sworn and examined before me this 3rd day of February, 1898.

JACOB WASHBURN,
Assistant to the Surrogate, New York County.

61 At a surrogate's court held in and for the county of New York, at the surrogate's office in the city of New York on the 28th day of February in the year 1898.

Present: Hon. Frank T. Fitzgerald, surrogate.

In the Matter of Proving the Last Will and Testament of ELIZABETH V. VOORHEES, Deceased.

The citation herein having been duly issued, served, and returned, the allegations of the parties appearing having been heard, and the proofs having been duly taken by the surrogate among other things as to the execution of said instrument bearing date Aug. 12th 1898, and the probate of the said will not having been contested, and it appearing to the surrogate that the will was duly executed and that the testatrix at the time of executing it was in all respects competent to make a will and not under restraint,

it is ordered, adjudged and decreed that the instrument offered for probate herein be and the same hereby is admitted to probate as the last will and testament of the said deceased valid to pass real and personal property and that letters testamentary be issued thereon to the executors who may qualify thereunder.

FRANK T. FITZGERALD, *Surrogate.*

62 The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or whom they may concern, send greeting:

Know ye, that at the county of New York, on the 28th day of February in the year of our Lord one thousand eight hundred and ninety-eight before Hon. Frank T. Fitzgerald a surrogate of our said county, the last will and testament of Elizabeth B. Voorhees deceased, was proved, and is now approved and allowed by us; and the said deceased having been at the time of her death a resident of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testatrix and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased and any way concerning her will, is granted unto George Albright and Luther C. Voorhees, each of the county and State of New York, and Wesley Albright of McLean, Tompkins Co. N. Y. the executors in the said will named, they being first duly sworn, well, faithfully and honestly to discharge the duties of such executors.

In testimony whereof, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

63 Witness, Hon. Frank T. Fitzgerald a surrogate of our said county, at the city of New York, the 7th day of March in the year of our Lord one thousand eight hundred and ninety-eight and of our Independence the one hundred and 22nd.

J. FAIRFAX McLAUGHLIN,
[L. S.] *Clerk of the Surrogate's Court.*

64 Surrogate's Court, New York County.

In the Matter of the Application of WILLIAM H. MAGINNIS for the Issue to Him of Letters Testamentary under the Will of Elizabeth B. Voorhees, Deceased.

To the surrogate's court of the county of New York:

The undersigned, by this his petition, respectfully shows:

I. That on November 18th 1897, the said Elizabeth B. Voorhees, departed this life in the city of New York, leaving a will, which was, on the 28th day of February, 1898, proved and duly admitted to probate by the surrogate of this county, which will is recorded in Liber 581 of Wills at page 349.

II. That to the executors named in said will, viz: George Albright, Luther C. Voorhees, and Wesley Albright, letters testamentary were duly issued on March 7th, 1898, and they thereupon duly qualified and entered upon the discharge of the duties of their said office.

III. That thereafter and on or about August 23, 1898, said

Luther G. Voorhees departed this life leaving but two of
65 said executors now living.

IV. That said wil contained, among other things, the following provision:

"Lastly, I hereby nominate and appoint my brother George Albright, my husband Luther C. Voorhees and my brother Wesley Albright, executors of this my last will and testament, and trustees of the several trust estates hereinbefore created. I direct that no bonds be required of them for the faithful discharge of their duties as such, and in case either of them shall refuse or be unable to act as such, or shall die, or resign, then I nominate and appoint William H. Maginnis, counsellor-at-law, of the city, county and State of New York, executor and trustee hereunder in place of the one so refusing, or who is unable to act, or who dies or resigns, and I direct that no bond be required of him for the faithful discharge of his duties as such."

Whereby your petitioner is entitled to qualify and receive letters testamentary under said will, he having never in any manner renounced his right to qualify as such executor of said will.

Wherefore your petitioner prays that letters testamentary may be issued to him by this court under the said last will and testament of said Elizabeth B. Voorhees, deceased, in the place of Luther C. Voorhees, also deceased, and that your petitioner be per-
66 mitted to qualify as such, and as in duty bound your petitioner will ever pray.

Dated New York, October 27th, 1898.

WILLIAM H. MAGINNIS, *Petitioner.*

STATE OF NEW YORK, } ss.:
County of New York, }

William H. Maginnis, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WILLIAM H. MAGINNIS.

Subscribed and sworn to before me October 28th 1898.

[L. S.] CHAS. E. COLSTON,
Notary Public, No. 163, *N. Y. Co.*

67 At a term of the surrogate's court of the county of New York, held at the court-house in the city of New York on November 1st, 1898.

Present: Hon. John H. V. Arnold, surrogate.

In the Matter of the Application of WILLIAM H. MAGINNIS for the Issue to Him of Letters Testamentary under the Will of Elizabeth B. Voorhees, Deceased.

On reading and filing the petition of William H. Maginnis hereto annexed, verified October 28th 1898, and on the will of Elizabeth B. Voorhees, deceased, heretofore admitted to probate in this court, and on motion of John Cummins, attorney for said William H. Maginnis, it is

Ordered, adjudged and decreed that letters testamentary under the will of Elizabeth B. Voorhees, deceased, be issued to said William H. Maginnis, in the place of Luther C. Voorhees deceased, and that said William H. Maginnis may qualify hereunder.

JOHN H. V. ARNOLD, *Surrogate.*

68 The People of the State of New York, by the grace of God free and independent, to all — whom these presents shall come or whom they may concern, send greeting:

Know ye, that at the county of New York, on the 28th day of February in the year of our Lord one thousand eight hundred and ninety-eight before Hon. Frank T. Fitzgerald a surrogate of our said county, the last will and testament of Elizabeth B. Voorhees deceased, was proved, and in now approved and allowed by us; and the said deceased having been at the time of her death a resident of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testatrix and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased and any way concerning her will, is granted unto William H. Maginnis of the county and State of New York, (in conjunction with George Albright and Wesley Albright who heretofore qualified, Luther C. Voorhees who heretofore qualified having died), an executor in the said will named, he being first duly sworn, well, faithfully and honestly to discharge the duties of such executor

In testimony whereof, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

69 Witness, Hon. Frank T. Fitzgerald surrogate of our said county, at the city of New York, the 7th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

[L. S.] J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

70 All which we have caused by these presents to be exemplified, and the seal of our said surrogate's court to be hereunto affixed.

Witness, Hon. John H. V. Arnold, a surrogate of the county of New York, at the city of New York, the first day of November in

the year of our Lord one thousand eight hundred and ninety-eight of our Independence the one hundred and twenty-third.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

I, John H. V. Arnold, a surrogate of said county, and presiding magistrate of the surrogate's court, do hereby certify that J. Fairfax McLaughlin, whose name is subscribed to the preceding exemplification, is the clerk of said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify, that the seal affixed to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, November 1st, 1898.

JOHN H. V. ARNOLD, *Surrogate.*

(10c. I. R. stamp.)

STATE OF NEW YORK, }
County of New York, } *ss:*

71 I, J. Fairfax McLaughlin, clerk of the surrogate's court of the county of New York, do hereby certify that Hon. John H. V. Arnold, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the county of New York, duly elected, sworn and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof, I have hereto set my hand and [SEAL.] affixed the seal of the said court, this 1st day of November, 1898.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate's Court.

(10c. I. R. stamp.)

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. vs.* B. J. Franklin, *et al.* Exemplified copy of will and the appointment of executors of the last will. Filed June 5th, 1899. Lloyd Johnston, clerk.

72 In the Supreme Court of the Territory of Arizona, of the January Term, 1899.

JAMES L. UTTER ET AL. }
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA. }

L. H. Hole being first duly sworn on oath states: That he is the agent of plaintiffs in his behalf; that he knew Elizabeth B. Voorhees in her lifetime; that she resided in the county of New York and in the State of New York and that she departed this life on about November 18th, 1897. He states that at the time of her death she was the owner of thirty of the bonds described in the petition

herein with coupons thereof, since January 1st, 1895 and that the same were a part of her estate at the time of her death and that they became the subject of administration in the State of New York. He files with this affidavit a certified copy of the will of said deceased and the probate thereof in the surrogate court of the county of New York, State of New York and also copy of letters testamentary granting to William H. Magginas and George Albright and Westly Albright and Luther C. Voorhees the appointment of executors of the last will and testament of the said Elizabeth, deceased.

He states that they entered upon their duties and among
73 other things the said bonds came into their hands and possession for due administration according to law.

He makes this affidavit in support of the motion heretofore filed in said cause to substitute the said executors as petitioners herein in place of the said Elizabeth, deceased and further affiant sayeth not.

L. H. HOLE.

Subscribed and sworn to before me this 5th day of June, A. D., 1899.

[SEAL.] LLOYD JOHNSTON,
Clerk Supreme Court of the Territory of Arizona.

(Endorsed:) 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. vs.* B. J. Franklin, *et al.* Affidavit of L. H. Hole as to will. Filed June 5th, 1899. Lloyd Johnston, clerk.

(Carbon copy of the foregoing affidavit filed with the following endorsement.)

Affidavit in support of motion to substitute parties. No. 546. In the supreme court Territory of Arizona. James L. Utter, *et al. vs.* Loan Commissioners. Service by copy admitted this 7th day of June 1899. C. W. Wright, of counsel for respondents. Filed June 8th, 1899. Lloyd Johnston, clerk.

74 Supreme Court of the United States, October Term, 1898.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Appellants,
vs.
B. J. FRANKLIN, Governor, ET AL. } No. 94.

The death of Elizabeth B. Voorhies, one of the appellants, having been suggested, now, on motion of Mr. Frederic D. McKenney, of counsel for the appellants, it is ordered by the court that George Albright, Wesley Albright and W. H. Maginnis, executors of the said Elizabeth B. Voorhies, deceased, be, and they are hereby, made parties appellants in this cause.

April 25, 1899.

A true copy.
Test:
[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 546. In the supreme court, of the Territory of Arizona. James L. Utter *et al. vs.* Loan Commissioners of Arizona. Order of U. S. Supreme Court. Filed July 31st, 1899. Lloyd Johnston, clerk.

75 Supreme Court of the United States, October Term, 1898.

JAMES L. UTTER and GEORGE ALBRIGHT, WESLEY ALBRIGHT, and W. H. Maginnis, Executors of Elizabeth B. Voorhies, Appellants,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona. } No. 94.

Appeal from the supreme court of the Territory of Arizona.

This cause came on to be heard on the transcript of the record from the supreme court of the Territory of Arizona, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the order of the said supreme court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings not inconsistent with the opinion of this court.

April 25, 1899.

A true copy.
Test:
[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. v.* Loan Commissioners of Arizona. Decree of U. S. Supreme Court. Filed July 31st, 1899. Lloyd Johnston, clerk.

76 I, Elizabeth B. Voorhees, of the city, county and State of New York, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this instrument to be my last will and testament, hereby revoking all former wills by me made.

First. I direct the payment by any executors hereinafter named of all my just debts and funeral expenses.

Second. I direct that after my decease, my body be interred in the Albright family burial plot at Dryden, in the State of New York, where my father, mother and one of my sisters are buried.

Third. I give and bequeath unto my husband, Luther C. Voorhees, the sum of five hundred dollars ($500.00) in cash, one (1) picture of Lincoln and his cabinet, one (1) picture of General Grant, and the following books, to wit: History of the American Revolution in two volumes, Life of Lincoln in one volume, Life of General Grant in

two volumes and Seward's Travels Around the World in one volume, the said pictures and books being now in my residence, No. 51 West Forty-second street, New York city.

I also give and bequeath unto my said husband the furniture now in his bed-room at my said residence, consisting of one bedstead, one bureau, one table, chairs, pictures and ornaments.

Fourth. I hereby declare that all the furniture now con-
77 tained in the basement of my residence No. 51 West Forty-second street, New York city, and also the bedstead, two bureaus, one chair and one table now in the room occupied by my brother George Albright, at my said residence belong to my husband, Luther C. Voorhees, he having bought and paid for the same.

Fifth. I give and bequeath to my brother, George Albright, the sum of five hundred dollars ($500.00) in cash, one cabinet bookcase now in the parlor of my said residence, all the furniture now in my own bed-room at my said residence, consisting of one bedstead, one bureau, one lounge, tables, chairs, picture and ornaments, the furniture, pictures and ornaments now contained in the room occupied by him at my said residence, excepting the bedstead, two bureaus, one chair and one table, which belongs to my husband, Luther C. Voorhees, and also the oil painting by William Livingston Anderson now in the parlor of my said residence.

Sixth. I give and bequeath to my brother, Harrison Albright, the sum of five hundred dollars ($500.00) in cash.

Seventh. I give and bequeath to my brother, Aaron Albright, the sum of five hundred dollars ($500.00) in cash.

Eighth. I give and bequeath to my brother, Wesley Albright, the sum of five hundred dollars ($500.00) in cash.

Ninth. I give and bequeath to my sister, Anna Maria Lacey, the sum of one thousand dollars ($1,000.00) in cash.

Tenth. I give and bequeath to my sister, Elmina Lord, the sum of one thousand dollars ($1,000.00) in cash.

78 Eleventh. I give and bequeath to my sister, Samantha Cantine, the sum of one thousand dollars ($1,000.00) in cash.

Twelfth. I give and bequeath to my niece, Minnie J. Cantine, daughter of the said Samantha Cantine, the sum of one thousand dollars ($1,000.00) in cash, also the black cabinet and the piano now in the parlor of my said residence, one oil painting of "cats" and one picture of "a bird on its nest."

Thirteenth. I give and bequeath to my nephew, George W. Albright, the sum of five hundred dollars ($500.00) in cash.

Fourteenth. I give and bequeath to my nephew, Elisha A. Lacey, the sum of five hundred dollars ($500.00) in cash.

Fifteenth. I give and bequeath to my said sister, Samantha Cantine and my said niece, Minnie J. Cantine, all of my diamonds and laces, share and share alike.

Sixteenth. I give and bequeath my red and blue India shawl to my sister, Elmina Lord, with the request that upon her death she bequeath the same to my sister, Samantha Cantine, or my niece, Minnie J. Cantine, or if neither shall be living then to my brother,

George Albright; and my other large India shawl I give and bequeath to my niece, Sarah Albright Snyder, with the like request.

Seventeenth. I give and bequeath all my wearing apparel not hereinbefore specifically bequeathed to my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, share and share alike.

Eighteenth. I give and bequeath all of my household furniture not hereinbefore specifically bequeathed, including all silver, cutlery, dishes, linen and bedding, but excluding the chandeliers, contained in my said residence, and also the sideboard and dining table now in the dining-room of my said residence, to my brother, George Albright, and my sister, Samantha Cantine, share and share alike.

Nineteenth. I give and bequeath to Mrs. Carrie B. Land, of San Francisco, California, my ruby ring, and if she shall not be living at the time of my death I give and bequeath the same to her then surviving daughters.

Twentieth. I direct that all the rest, residue and remainder of my estate, both real and personal, be sold and converted into cash by my executors hereinafter named, and for that purpose I hereby expressly authorize and empower my said executors to sell and dispose of the same or any part thereof at public or private sale, and at such times and in such manner and for such sum or sums as to them or a majority of them in the exercise of their best judgment may seem most expedient, and to convey all or any part thereof; and I direct that my said executors shall then deduct and set aside from said residuary estate the sum of three thousand dollars ($3,000.00), and I give, devise and bequeath the said sum of three thousand dollars ($3,000.00) to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my husband, Luther C. Voorhees, during his lifetime, and after his death I give and bequeath the said sum of three thousand dollars ($3,000.00) or the securities in which the same may then be invested to my brother, George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

Twenty-first. I direct that my said executors shall divide the balance or residue of my said residuary estate remaining after the deduction of the said sum of three thousand dollars ($3,000.00) into eight portions and I give, devise and bequeath the same as follows, to wit:

1. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income

therefrom after deducting all taxes and necessary expenses to my brother, George Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brothers,
81 Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

2. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my brother, Harrison Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be not then living I give and bequeath the same to my brothers, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

3. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities and to pay over the income therefrom after deducting all taxes and necessary expenses to my brother, Aaron Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brother,
82 George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright and Wesley Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

4. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my brother, Wesley Albright, during his lifetime, and after his death I give and bequeath the said eighth portion to my brother, George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright and Aaron Albright, my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

5. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my sister, Anna Marie Lacey, during her lifetime, and after her
83 death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be

not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

6. One of such eight- portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities and to pay over the income therefrom after deducting all taxes and necessary expenses to my sister Elmina Lord, during her lifetime, and after her death I give and bequeath the said eight- portion to my brother, George Albright, if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

7. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary
84 expenses to my sister, Samantha Cantine, during her lifetime, and after her death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters, Anna Maria Lacey and Elmina Lord, and my niece, Minnie J. Cantine, or such of them as may then be living, share and share alike.

8. One of such eighth portions I give, devise and bequeath to my said executors in trust, nevertheless, to invest and reinvest the same and keep the same invested in bonds secured by first mortgage on real estate or other first-class securities, and to pay over the income therefrom after deducting all taxes and necessary expenses to my niece, Minnie J. Cantine, during her lifetime, and after her death I give and bequeath the said eighth portion to my brother, George Albright if he be then living, and if he be not then living I give and bequeath the same to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, and my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, or such of them as may then be living, share and share alike.

Twenty-second. Should any of the legacies herein lapse, or fail for any reason, the same shall go to my brother, George Albright, hereinbefore named, if living, and if not living, then to my brothers, Harrison Albright, Aaron Albright and Wesley Albright, my sisters,
Anna Maria Lacey, Elmina Lord and Samantha Cantine,
85 and my niece, Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-third. Should any of the trusts herein created, or attempted to be created, lapse or fail for any reason, then I give, de-

vise and bequeath the property of such trust or trusts, or attempted trust or trusts, to my said brother, George Albright, if living, and if not living, then to my brothers, Harrison Albright, Aaron Albright and Wesley Albright my sisters, Anna Maria Lacey, Elmina Lord and Samantha Cantine, and my niece, Minnie J. Cantine, or such of them as may be living, share and share alike.

Twenty-fourth. Should any of the persons here named as legatees or beneficiaries contest the validity of this my last will and testament, or of any portion thereof, or in any way attempt to have this my last will and testament or any portion thereof declared void, it is my will that such person or persons shall not receive any legacy, bequest, income or benefit whatever from my estate.

Lastly. I hereby nominate and appoint my brother, George Albright, my husband, Luther C. Voorhees, and my brother, Wesley Albright, executors of this my last will and testament and trustees of the several trust estates hereinbefore created.

I direct that no bonds be required of them for the faithful discharge of their duties as such, and in case either of them shall
86 refuse or be unable to act as such, or shall die or resign, then I nominate and appoint William H. Maginnis, counsellor-at-law, of the city, county and State of New York, executor and trustee hereunder in place of the one so refusing or who is unable to act, or who die or resign, and I direct that no bond be required of him for the faithful discharge of his duties as such.

It is my wish and direction that neither of my said executors and trustees (including the said William H. Maginnis in case he shall be appointed as hereinabove provided) shall have power to act alone, but that at least two of them shall concur in any act done hereunder.

In witness whereof, I have hereunto subscribed my name to this my last will and testament written on 11 pages of paper at the city of New York aforesaid, the 12th day of August, 1897.

(Signed) ELIZABETH B. VOORHEES.

Subscribed by the testatrix, Elizabeth B. Voorhees, in the presence of each of us and at the same time declared by her to us to be her last will and testament, and thereupon we, at the request of the said testatrix and in her presence and in the presence of each other, sign our names hereto as witnesses this 12th day of August, 1897, at New York city.

(Signed) MARY HERSHFIELD,
41 *East 67th Street, N. Y. City.*
CAROLINE BOWNE,
274 *West 71st Street, N. Y. City.*

87 In the Probate Court of Maricopa County, Territory of Arizona.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

Oath of Office of Executors.

STATE OF NEW YORK, } ss:
County of Tompkins, }

George Albright, being duly sworn, deposes and says that he will support the Constitution of the United States and the laws of the United States and Territory of Arizona, and will faithfully perform his duties as an executor of the will of Elizabeth B. Voorhees.

GEO. ALBRIGHT.

Sworn to before me this 10th day of July, 1899.

GEO. E. MONROE,
Notary Public.

[SEAL.]

88 In the Probate Court of Maricopa County, Arizona Territory.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

Oath of Office of Executors.

STATE OF NEW YORK, } ss:
County of Tompkins, }

Wesley Albright, being duly sworn, deposes and says that he will support the Constitution of the United States and the laws of the United States and Territory of Arizona, and will faithfully perform his duties as an executor of the will of Elizabeth B. Voorhees.

WESLEY ALBRIGHT.

Sworn to before me this 10th day of July, 1899.

GEO. E. MONROE,
Notary Public.

[SEAL.]

89 In the Probate Court of Maricopa County, Arizona Territory.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

Oath of Office of Executors.

STATE OF NEW YORK, } ss:
County of New York, }

William H. Maginnis, being duly sworn, deposes and says that he will support the Constitution of the United States and the laws of the United States and Territory of Arizona, and will faithfully perform his duties as an executor of the will of Elizabeth B. Voorhees.

WILLIAM H. MAGINNIS.

Sworn to before me this 15th day of August, 1899.

LOUISE HEISLAR,
[SEAL.] *Notary Public, Kings Co.*

Commission filed in New York Co.

90 *Letters Testamentary.*

Copy.

In the Probate Court of the County of Maricopa, Territory of Arizona.

In the Matter of the Estate of ELIZABETH B. VOORHEES, Deceased.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

The last will of Elizabeth B. Voorhees deceased, a copy of which is hereto annexed, having been proven and recorded in the probate court of the county of Maricopa, Territory of Arizona, George Albright, Wesley Albright and William H. Maginnis who are named therein as such, are hereby appointed executors.

Witness, N. A. Morford clerk of the probate court of the
[SEAL.] county of Maricopa Territory of Arizona, with the seal of said court affixed, this eighth day of September A. D. 1899.

By order of the court.

N. A. MORFORD, *Clerk.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, N. A. Morford judge and *ex officio* clerk of the probate court in and for the county of Maricopa, Territory of Arizona, hereby
91 certify the within and foregoing to be a full, true and correct copy of letters testamentary issued in the therein-entitled matter, as the same remains of record and on file in the office of said clerk; I further certify that said letters have not been revoked.

I further certify that the copy of the will attached hereto is a true copy of the will now on file in my office, in said estate.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this eighth day of September A. D. 1899.

[SEAL.] N. A. MORFORD, *Clerk.*

(10c. I. R. stamp.)

(Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter, *et al. vs.* Loan Commissioners. Certified copy letters testamentary, issued out of the probate court of Maricopa county to George Albright *et al.* as executors of the estate of Elizabeth B. Voorhees, deceased. Filed Sept. 8th, 1899. Lloyd Johnston, clerk.

92 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and THE EXECUTORS OF THE ESTATE OF ELIZABETH B. VOORHIES, Petitioners,
against
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

I.

Come now the petitioners, and not in any way waiving their motion to dismiss and strike out the answer attempted to be filed in this case for the reason that the same was filed without leave of the court, and after a trial had been had in said cause, and for the further reason that judgment has been rendered in said cause, and for the further reason that the filing of the same disregards the decision and mandate of the Supreme Court of the United States, reasserts the same defenses which were asserted in the cause before the appeal to that court, and is in contempt of its mandate, come and defend against the said answer as follows, to wit:

That the first subdivision of the said answer does not state facts sufficient to show any reason why the prayer of the petition should not be granted, and for reply thereto and to each and all the subdivisions of said answer, the petitioners defend and deny all the material allegations of said subdivision, and they allege that the
93 said bonds were delivered to the railroad company in the said subdivision mentioned, with the full knowledge, direction, approval and consent of the board of supervisors of the said county of Pima, and they allege that after said bonds were so delivered said board of supervisors ratified and confirmed the delivery of the same, recognized the same as valid by paying interest coupons thereon, and they also acknowledged, ratified and confirmed the said delivery by exchanging the coupons of the bonds of said railroad company described in said subdivision for the interest coupons of the said bonds of Pima county which had before that time been delivered.

And said petitioners allege that the said bonds of Pima county described in the petition were delivered to the railroad company therein described in exchange for the first-mortgage bonds of said railroad company of a like amount, drawing the same rate of interest. The said bonds of said railroad company were delivered to and received and accepted by said county of Pima, and they have remained in the treasury of the said county ever since, and are now in the treasury of the county and the property of the county. That the said bonds of Pima county were made, executed, issued and delivered to the said Arizona Narrow Gauge Railroad Company under and pursuant to and in strict accordance with all the terms, conditions and provisions of the act of the legislature of the Territory of Arizona, approved February 21, 1883, en-
94 titled: "An act to promote the construction of a certain railroad;" and that the said bonds of Pima county were exchanged as aforesaid in good faith in compliance with the terms of

the said act of the legislature of the Territory of Arizona, approved February 21, 1883, by which they were authorized.

The petitioners allege that the said railroad mentioned in the said petition in said subdivision of said answer was as a matter of fact constructed from the city of Tucson in said county northerly to a point at or near the northern boundary line of said county, and the same was operated by the said company.

Said petitioners allege that the said county of Pima was and is the owner of the first-mortgage bonds of the said railroad company, which was a valid and existing first lien upon the railway constructed as aforesaid and the equipment thereof, and that it was in the power of said county of Pima to enforce its said lien by a foreclosure thereof, if there had been a failure to perform the conditions upon which said bonds were issued, to pay the interest specified in said bonds, and to operate said railroad and preserve and maintain the said property so mortgaged from waste and destruction; and instead of that the said county of Pima repudiated all responsibility thereunder; allowed the said railroad to go out of use and to be wasted; caused the same to be taxed upon a very heavy
95 assessment, to wit, — thousand dollars, and caused the said property to be sold for such tax, and said county received the proceeds of such sale, and permitted the purchasers of the railroad and equipment under such tax sale to take it up, remove and sell and hawk it about as junk and utterly destroyed; by reason whereof it permitted the security which was held to become valueless.

Said petitioners allege that the holders of the bonds mentioned in the petition had no lien upon the said railroad; had no control over said railroad corporation; had no means of enforcing any lien thereon; that the bonds held by them were simply the bonds of the county, and the holders of said bonds are in no way responsible, directly or indirectly, for any of the acts and neglects of the county hereinabove mentioned.

The petitioners allege that the said bonds in the petition mentioned after they had been delivered to the said railroad company were sold by the railroad company in public market; that they were sold upon the representation of the then members of the board of supervisors and the then treasurer of said county, and upon the recommendation and assurance of the leading business men of Pima county that the said bonds were valid, binding negotiable obligations of the county, and that the county was amply able and were willing and anxious to pay the same, and upon such representations so made the said bonds were sold at an adequate value and went
96 into the market to be exchanged from hand to hand by purchase by the bearer, and without endorsement, and, like other commercial paper, to be transferred by delivery only, and that the purchasers of said bonds bought the same in good faith and paid full value therefor in cash; and the proceeds of said Pima County bonds were used by said railroad company in the construction of the railroad to Tucson, northerly as aforesaid, or in payment of obligations and debts incurred in such construction, and a large part of the

same was paid to residents of and citizens of the said county of Pima, all of which was done with the full knowledge and approval of the board of supervisors of said county. The said petitioners purchased the said Pima County bonds in good faith and without any knowledge or notice of any kind of any fact or circumstance alleged in the said answer of defendants which they the defendants maintain or allege rendered or tended to render the said bonds illegal; and that the prior holders of said bonds likewise purchased the same in good faith and for full value and without any knowledge or notice of any such fact or circumstance.

The foregoing allegations are hereby made in reply to each and every of the subdivisions of said answer as fully and particularly as though each subdivision of said answer was specifically designated and all of said foregoing allegations specifically re-
97 peated as to each subdivision of said answer.

II.

The said petitioners allege that the said subdivision II does not state facts sufficient to constitute any defense to said petition, and offers no reason why the prayer of the petition should not be granted, and the defense therein set up has been fully adjudicated in the Supreme Court of the United States in this case, and should not now be heard and considered, and the filing of the same is in contempt of the mandate of said court. and for answer to the said subdivision petitioners deny each and every of the material allegations thereof.

III.

As to the subdivision III of said answer, the petitioners aver that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto petitioners say that the issues therein presented have been decided by the supreme court of this Territory to constitute no defense whatever in this case, and to reassert the same is in contempt of the mandate of the supreme court.

IV.

As to subdivision IV of said answer, petitioners assert and allege the same as to the third subdivision, and for answer thereto the petitioners allege that they acquired the bonds specified and
98 set forth in the petition in good faith and for full value and in open market, and that the same had long before that time been sold and exchanged in good faith and in compliance with the act of legislature by which they were authorized, as heretofore and herein alleged by the exchange of the first-mortgage bonds of said railroad company for the said bonds specified in the petition herein, and the said bonds were sold and exchanged in good faith to innocent purchasers thereof in open market, and by divers and sundry transfers and sales they became the property of the petitioners.

V.

With reference to subdivision V of the said answer, petitioners defend and say that the same does not state facts sufficient to constitute any defense to said action or show any reason why the prayer of the petition should not be granted, and for answer thereto said petitioners disclaim and deny that any memorial to Congress is any part of this legislation and has any binding force or effect upon the laws which may be passed by Congress, and they allege that the said memorial by its terms and by fair construction thereof upon its face includes the advice and request of the said legislature of the Territory of Arizona to validate the said bonds specified in the petition; but whether the same does or not the act itself of Congress validates them, and that being true, the said memorial can have no force or effect whatever.

And the said petitioners allege that the said bonds and coupons are and were the outstanding bonds of Pima county, sold
99 and exchanged in accordance with the law, and the validity thereof has been made clear and certain by the act of Congress, which has removed all doubt which may have existed heretofore as to their validity.

VI.

As to the statute of limitations asserted in subdivision VI of said answer, petitioners allege that the cause of action began and accrued on the 6th day of June, 1896, and that the statute of limitations commenced to run from that date, and not before, and the time in which an action could be brought thereon has not yet expired, and hence petitioners allege that the said subdivision does not state facts sufficient to constitute any defense to said cause, or any reason why the prayer of the petition should not be granted.

VII.

As to subdivision VII of said answer, the petitioners defend and say that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto the petitioners allege that by the decision of the Supreme Court in this case it was decided that this suit is against the Loan Commissioners of the Territory of Arizona, whoever the individuals may be, and that this court has been directed by a mandate of that court to take such steps as may be necessary, and such action as may be required in accordance
100 with the opinion and decision of the Supreme Court of the United States, and hence petitioners allege that this court in obedience thereto, and in pursuance thereof, must disregard the said subdivision VII of said answer, and petitioners ask that the same be stricken out or utterly disregarded by this court.

And the petitioners allege that if it be true, as stated, that the said Franklin has departed this life, the attorneys who signed said answer have no right or authority to appear for him, and the petitioners requests and asks the court that a rule be entered against the

attorneys who have filed the answer to this case and entered the appearance, and to show by such appearance for whom they appear in this case and for whom and on behalf of whom this answer is filed, and whom they represent in filing the same.

VIII.

As to subdivision VIII of said answer, the petitioners deny the allegations of said answer that the said legislature of the Territory of Arizona repealed the loan commission of Arizona, and that the loan commission no longer exists; and petitioners allege that the legislature of the Territory of Arizona had no power to repeal the same, and that any attempt to do so is void and of no force and effect.

IX.

As to subdivision IX of said answer, petitioners allege that
101 the holders of said bonds alleged in such petition had and have the right by law to have their bonds funded in accordance with the acts of Congress and the acts of the legislature of the Territory of Arizona whether it be the wish of the county of Pima to have the same funded or not, and for further answer to the said subdivision IX of said answer, petitioners state that the county of Pima is not a party to this suit; the answer is not filed for or on behalf of said county upon its face, and the allegations as to the wishes of the county of Pima can have no weight or consideration in this court.

X.

As to subdivision X of said answer, the petitioners state that the same does not state facts sufficient to constitute a defense to said action, nor does it offer a reason why the said prayer of the petition should not be granted; and in answer thereto petitioners deny specifically the allegations that the bonds owned by petitioners were not sold or exchanged in good faith, in accordance with the laws of the Territory, and they assert and allege that the said bonds were sold and exchanged in good faith, in accordance with the act of the legislature of the Territory of Arizona under which they were issued, and the same were sold to purchasers in good faith and for valuable consideration in open market, and that they became the property of petitioners by purchase and for valuable consid-
102 eration before the said bonds were due, and hence they allege that the same are valid outstanding bonds of the county, and that the holders thereof have the right to have them funded according to the laws of Congress and the laws of the Territory of Arizona, and to have the petition in this case granted and allowed by this court.

XI.

As to subdivisions XI, XII, XIII, XIV of said answer, petitioners deny that said railroad company was insolvent as alleged; deny that the said company never built and that it never operated any part

of the railroad to be built according to its said articles of incorporation, or any railroad whatever; and deny that immediately after it came into possession of the bonds of Pima county it ceased all appearance of business and pretense of doing business, and deny that the said bonds of the said railroad company have at all times been worthless; and with reference thereto the petitioners have heretofore fully answered, and as to the facts upon which the same were issued, in the subdivision of this reply.

And said petitioners further deny the fourteenth subdivision of said answer, and reassert with reference thereto the allegations of subdivision — of this reply.

XVI.

With reference to subdivision XVI of said answer, petitioners deny that the statute of limitations has run against any of the coupons of said bonds, and the same became validated by act of Congress of June 6, 1896, and that the time for commencing the action thereon has not yet expired.

XVII.

As to paragraph XVII of said answer, petitioners allege that the same does not state facts sufficient to constitute a cause of action or to make a claim or set-off in said cause, and further, that there can be no claim or set-off made in a suit of this kind, which is a suit for a mandamus, and that no set-off can be made as against petitioners, the *bona fide* holders of said negotiable Pima County bonds; and again, that the loan commissioners of Arizona can have no claim or set-off with reference thereto, as the said Narrow Gauge bonds are not bonds which are owned by said loan commissioners of the Territory of Arizona, but are the property of the county of Pima, and the county of Pima is not a party to this suit.

Wherefore, the petitioners pray that the prayer of the petition be granted, and that the answer therein be disregarded, and for such other and further relief as the law or equity affords.

BARNES & MARTIN &
DILLON & HUBBARD,
Att'ys for Petitioners.

TERRITORY OF ARIZONA, }
County of Maricopa. }

William H. Barnes being duly sworn on oath states that he is the agent of petitioners in this behalf. He states that the facts alleged in foregoing reply in denying allegations of answer are true in substance & in fact, and as to other matters he believes them to be true.

WILLIAM H. BARNES.

Subscribed and sworn to before me this first day of November A. D., 1899.

LLOYD JOHNSTON,
Clerk Supreme Court of Arizona,
[SEAL.] By ANGIE B. PARKER, *Deputy.*

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al. vs.* B. J. Franklin *et al.* Reply of petitioners. Filed Nov. 1st, 1899. Lloyd Johnston, clerk. By Angie B. Parker, deputy.

105 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

Be it remembered that this cause came on to be heard on the first day of November, A. D. 1899, and the motion of the petitioners heretofore filed to strike from the files the so-called amended return filed in said court on the 1st day of June A. D., 1899, and the same having been heretofore submitted to the court, a copy of which said motion is hereto attached and made a part hereof, was decided by the court and the said motion was denied and the said so-called first amended return was by the court ordered to be permitted to remain in the record and to stand as a return to the petition herein and to said rulings and decision of the court the petitioners then and there excepted, and, inasmuch as the matters herein are not a part of the record or judgment-roll in said cause this bill of exceptions is hereby signed and is hereby ordered to be made part of the judgment-roll and the record in this cause.

Done this first day of November, A. D. 1899, by the court.

RICHARD E. SLOAN,
Associate Justice.

106 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
THE LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

And now comes the petitioners by Barnes & Martin, their attorneys, and move the court to strike from the files the so-styled first amended return herein for the following reasons, namely:

1. The same was filed without leave of the court.

2. By the decision mandate and opinion of the Supreme Court of the United States in this case no new defenses or new "returns" can be considered by this court.

3. This court in obedience to the mandate opinion and decision of the Supreme Court of the United States has no power to do other than direct the issuance of the writ of mandamus as prayed for in the petition herein and execute the decision of the Supreme Court of the United States by ordering a proper writ in accordance with the issues heretofore herein — and decided.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Jas. L. Utter, *et al.*, *vs.* B. J. Franklin, *et al.* Bill of exceptions. Filed Nov. 1st, 1899, Lloyd Johnston, clerk. By Angie B. Parker, deputy.

107 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and THE EXECUTORS OF THE ESTATE OF ELIZABETH B. VOORHIES, Petitioners,
against
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

I.

Come now the petitioners, and not in any — waiving their motion to dismiss and strike out the answer attempted to be filed in this case for the reason that the same was filed without leave of the court, and after a trial had been had in said cause, and for the further reason that judgment had been rendered in said cause, and for the further reason that the filing of the same disregards the decision and mandate of the Supreme Court of the United States, reasserts the same defenses which were asserted in the cause before the appeal to that court, and is in contempt of its mandate, by this amended reply, the same having first been served on attorneys for respondents come and defend against the said answer as follows, to wit:

II.

That the first subdivision of the said answer does not
108 state facts sufficient to show any reason why the prayer of the petition should be granted, and for reply thereto and to each and all the subdivisions of said answer, the petitioners defend and deny all the material allegations of said subdivisions, and allege that the said bonds were delivered to the railroad company in the said subdivisions mentioned, with the full knowledge, direction, approval and consent of the board of supervisors of the said county of Pima, and they allege that after said bonds were so delivered said board of supervisors ratified and confirmed the delivery of the same, recognized the same as valid by paying interest coupons thereon, and they also acknowledged, ratified and confirmed the said delivery by exchanging the coupons of the bonds of said railroad company described in said subdivisions for the interterest coupons of the said bonds of Pima county which had before that time been delivered.

And said petitioners allege that the said bonds of Pima county described in the petition were delivered to the railroad company therein described in exchange for the first-mortgage bonds of said railroad company of a like amount, drawing the same rate of interest. The said bonds of said railroad company were delivered to and received and accepted by said county of Pima, and they have remained in the treasury of said county ever since, and are now in

the treasury of the county and the property of the county.
109 That said bonds of Pima county were made, executed, issued and delivered to the said Arizona Narrow Guage Railway Company under and pursuant to and in strict accordance with all the terms, conditions and provisions of the act of the legislature of the Territory of Arizona approved February 21st, 1883, entitled "An act to promote the construction of a certain railroad;" and that the said bonds of Pima county were exchanged as aforesaid in good faith in compliance with the terms of the said act of the legislature of the Territory of Arizona, approved February 21st, 1883, by which they were authorized.

The petitioners allege that said railroad mentioned in said petition in said subdivision of said answer was as a matter of fact constructed from the city of Tucson in said county northerly ten miles and to a point at or near the northern boundary line of said county, and the same was operated by said company.

Said petitioners allege that the said county of Pima was and is the owner of the first-mortgage bonds of said railroad company, which was a valid and existing first lein upon the railway constructed as aforesaid and the equipment thereof, and that it was in the power of said county of Pima to enforce its said lien by a foreclosure thereof, if there has been a failure to perform the condition upon which said bonds were issued, to pay the interest specified in said bonds, and operate said railroad and preserve and maintain the said prop-
110 erty so mortgaged from waste and destruction; and instead of that the said county of Pima repudiated all responsibility thereunder; allowed the said railroad to go out of use and to be wasted; caused the same to be taxed under a very heavy assessment, to wit: —— thousand dollars, and caused said property to be sold for such tax, and said county received the proceeds of such sale, and permitted the purchasers of the railroad and equipment under such tax sale to take it up, remove and sell and hawk it about as junk and utterly destroyed; by reason whereof it permitted the security which was held to become valueless.

Said petitioners allege that the holders of the bonds mentioned in the petition had no lein on said railroad; had no control over said railroad corporation; had no means of enforcing any lien thereon; that the bonds held by them were simply the bonds of the county and the holders of said bonds are in no way responsible, directly or indirectly, for any of the acts and neglects of the county hereinabove mentioned.

All of which fully appears in the minutes of said board at the dates hereinafter named and in the words and figures following, viz:

April 27th, 1883.

OFFICE OF THE BOARD OF SUPERVISORS,
PIMA COUNTY, ARIZONA.

To M. G. Samaneigo and A. D. Otis, members of the board of
111 supervisors of Pima county, A. T.:

GENTLEMEN: You will please take notice that W. H. Culver, president of the Narrow Guage Railroad Company, has this day filed in the office of the board a notice that said railroad company is ready to exchange bonds with the county of Pima, according to the provisions of an act of the Legislative Assembly of the Territory of Arizona, approved March 6th, 1883; entitled An act to provide for the construction of a certain railroad, and that in accordance with the provisions of section one of said act enjoining upon me the duty of calling a meeting of the board of supervisors to be held within five days after the receipt of said notification, there will be a meeting of the board at their office in the county court-house on Monday, the 30th day of April, A. D. 1883, at 10 o'clock a. m. to take action on said notice and application.

(Signed) JAMES H. TOOLE, *Chairman.*

April 30th, 1883.

The board of supervisors met pursuant to call of the chairman issued April 27th, under the provision of section one of the act of the Legislative Assembly of the Territory of Arizona, approved February 21st, 1883, entitled "An act to provide for the construction of a certain railroad," to consider the appiication of W. H. Culver, president of the Arizona Narrow Gauge Railroad Company,
112 for an exchange of bonds in accordance with the provisions of said act.

May 1st, 1883.

This being the day and hour set pursuant to adjournment from yesterday's session for the hearing of the application — Narrow Guage Railroad Company for exchange of bonds in accordance with the provisions of an act of the Legislative Assembly of the Territory of Arizona, approved February 21st, 1883, entitled An act to provide for the construction of a certain railroad; and W. H. Culver and H. Farley, Esq., president and secretary respectively of said railroad company being present and presenting reasons and arguments in favor of the exchange of bonds. Ordered that the matter be taken under advisement.

May 4th, 1883.

The board again took under consideration the matter of the application of the Narrow Guage railroad for an exchange of $200,000 in bonds with Pima county.

After arguments being heard for and against the proposition, the matter was taken under advisement until May 5th, at 10 o'clock a. m.

May 5th, 1883.

The board resumed the consideration of the application of the Narrow Guage Railroad Company for an exchange of bonds.

After argument for and against the proposition, Supervisor Toole offered the following:

Ordered, that the board having duly considered the appli-
113 cation of the Narrow Guage Railroad Company for an exchange of $200,000 bonds and being of the opinion that the said railroad company is not in a position to give any guarantee that they intend in good faith, to build said road, it is ordered, that until said company do some act in accordance with the provisions of the law under which they ask an exchange of bonds, their application be refused and denied.

The motion not being seconded was not entertained.

Supervisor Samaneigo presented for the consideration of the board the following order:

Ordered, that $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled "An act to promote the construction of a certain railroad," approved the 21st day of February, A. D. 1883, be issued, and that the same be placed in the hands of the county treasurer upon the Arizona Narrow Guage Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned, that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of the above-named railroad, that said company will repay the said county of Pima all the expense incurred in issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form.

The question being on the adoption of the order those voting in the affirmative were Supervisors Otis and Samaneigo, those
114 voting in the negative were Supervisor Toole, so the motion — passed and adopted.

May 19th, 1883.

Ordered, that the clerk be instructed to prepare forms of bonds to be issued ready for the inspection of the board May 21st, 1883, at 10 o'clock a. m.

May 21st, 1883.

The clerk submitted forms of bonds to be issued under law of February 21st, and May 6th, and being examined, ordered that they be sent to A. L. Bancroft & Co. for lithographing.

August 2nd, 1883.

In the matter of the exchange of bonds with the Arizona Narrow Guage Railroad Company:

Ordered, that the respective county officers, required by law so to do, sign and seal said bonds, and thereupon the clerk of the board

is hereby instructed to deliver said bonds to the county treasurer, taking his receipt therefor.

November 7th, 1884.

Ordered, all members voting "aye," that the county treasurer be instructed not to pay any interest on the bonds issued by the county to the Arizona Narrow Guage Railroad Company until he receive the further order of the board, and that the clerk transmit a copy of this order to the treasurer.

115 April 13th, 1885.

W. H. Culver appeared and asked that a copy of the opinion of the dist. att'y in regard to the Narrow Guage R. R. Comp'y be handed to the county treasurer. The board agreed to take the matter up for consideration this evening.

The opinion of the district attorney in regard to the action of the old board in making no levy for taxes to pay interest on Narrow Guage R. R. bonds was again brought up for consideration, J. C. Handy being interested in the company, retired from the board and the probate judge was summoned to act in his stead. The matter was discussed at length by Messers. H. S. Stevens, L. C. Hughes and W. H. Culver asked the board to transmit a copy of the opinion of the district attorney to the county treasurer. On motion the opinion of the district attorney was ordered on file in this office.

July 6th, 1886.

A communication was received from county treasurer, stating that he had made an exchange with the Narrow Guage R. R. Co. of the interest coupons on the bonds issued and received by virtue of act 35 of the Laws of 1883.

Also that a certain provision of said act having been complied with, he had issued and received the second paying of fifty thousand dollars worth of bonds. Communication ordered on file.

116 Quarterly report of county treasurer was presented and it appearing there was no mention made of the bonds of the Narrow Guage R. R. received and exchanged for Pima County bonds, the treasurer was instructed to make a note of that fact in the colum- of remarks.

August 9th, 1886.

Here Supervisor Handy presented the following resolution which was adopted and ordered spread upon the minutes.

Whereas the county has a large outstanding indebtedness, and whereas said indebtedness was caused by making permanent improvements in the county, the administration of justice in this frontier country, the high rate of interest paid on indebtedness, together with the depression caused by Indian raids and murders.

Resolved that the board levy the minimum rate allowed by law, with the recommendation that our representatives in the legislature

pass a law authorizing the county to fund its debts, in order that posterity may impart for advantages there received from the result of the labors of this generation.

Resolved that a copy of this resolution be forwarded to each legislator elected from this county.

September 4th, 1886.

Report of Committee.

TUCSON, A. T., *Sept. 3rd*, 1886.

Your committee of the whole respectfully report that we
117 have examined into the financial condition of the county as shown by the books and report of the treasurer.

We find that January 1st, 1885, there was $80,000 floating indebtedness.

We find that there has been created a floating indebtedness since that date of $85,000 including interest on same.

We find that there is $70,000 on court-house bonds and $150,000 on Narrow Guage Railroad bonds, making a total indebtedness of $385,000.00.

As assets to the county, we note $15,000.00 cash, in Narrow Guage Railroad bonds $150,000.00 which subtracted from the $385,000.00 liabilities leaves $220,000.00, which is substantially the indebtedness of this county.

Attention is called to the fact that — court-house and jail has been built and that the grounds around have been beautifully adorned, roads have been built and improved, all of which is for the benefit of posterity.

The $49,000.00 of the Port Lobus bonds have also been redeemed and that debt extinguished.

There is now due from the tax-payers of the county on the current year's assessment about $75,000.00, a probable delinquency of fifteen per cent. having been deducted.

We do not give this as being correct to a dollar, as the short time in which the committee has to examine the books of the office
118 is not sufficient for that purpose, but the figures are substantially correct.

The committee earnestly renews its recommendation that the indebtedness of this county be bonded at a low rate of interest, and to run for a sufficient length of time, that our successors in Pima county be enabled to pay in part for the permanent improvement they will enjoy, and that sufficient money be raised at the same time to furnish cash for the immediate payment of all warrants issued until the first taxes are paid into the treasury.

In conclusion we herewith furnish you with the figures as furnished by the county treasurer.

(Signed) R. R. RICHARDSON,
Chairman of Committee.

Report of County Treasurer.

Financial standing and outlook of Pima county, Arizona.

September 1st, 1886.

TUCSON, *September 3rd*, 1886.

To the honorable board of supervisors, Pima county, Arizona.

GENTLEMEN: In accordance with instructions, I hereby submit a rough tho', I think, quite accurate statement of the conditions of this county.

DR.

Bonded Indebtedness.

Court-house bonds	$70,000.00
N. G. Railroad bonds	150,000.00

119 *Floating Indebtedness.*

General fund warrants	General, contingent, & road fund.	
Contingent fund warrants	Warrants and accrued interest.	
Road fund warrants and accrued interest.	$80,000 of this am't & int. accrued that were drawn by the former board of supervisors.	165,000.00
Total		$385,000.00

CR.

N. G. Railroad bonds	$150,000.00
Surplus in the treasury	15,000.00
Total	$165,000.00
Actual indebtedness of Pima county on September 1st, 1886	220,000.00

The estimated floating indebtedness of Pima county on January 1st, 1885, when the present board took their seats was about $135,000,00.

The present floating indebtedness as estimated in the foregoing statement is about $165,000.00.

A very good showing when the following facts are taken into account.

1st. There will be at least $25,000.00 worth more of warrants to redeem during the next four months, than will be issued.

2nd. And this consideration should probably come first. All

the warrants drawn for this year, at any rate, were based,
120 as they should be, on returns from the tax-roll of 1886, a most legitimate asset of this county at the present moment.

3rd. The present board has been compelled by law to transfer over $20,000.00 from the general fund for the payment of the county officials, their fees being so much short of the salaries provided by law.

The standing of the county so far as its floating indebtedness is concerned, and that is what the board of supervisors are accountable for, may now be easily foreseen for the 1st of Jan. 1887, the date of the expiration of the term of the present board of supervisors.

Respectfully submitted,

(Signed) THOMAS HUGHES, *Treasurer.*
Per HENEY, *Deputy.*

Nov. 15th, 1886.

Mr. Flagstaff and Mr. Walker of the Narrow *Guage* R. R. Co. appeared before the board on matters concerning the future construction of the road, and as J. C. Handy, a member of the board, was an interested party and R. R. Richardson was absent, it was decided to postpone any matter they may haye to submit until such time as a full board was present.

December 16th, 1886.

Matters pertaining to the Narrow *Guage* R'road Company having come up, making inquiry as to the non-publication by the
121 treasurer, as heretofore ordered by the board, of the advertisement for the sale of the Narrow *Guage* Railroad bonds.

Supervisors J. C. Handy, being an interested party retired from the board, Probate Judge J. S. Wood taking his place according to law.

The treasurer being present stated, that as he was not directed as to the special time of publication, he had given the matter his attention and had sought legal advise as to his duty in the premises.

On motion the clerk was instructed to notify the treasurer to have advertisement published forthwith, and at the lowest market price.

December 22nd, 1886.

Matters pertaining to the Narrow *Guage* railroad coming before the board, and Supervisors Handy being an interested party withdrew from the board and Probate Judge, J. S. Wood entered and took his seat according to law.

Petitions were then presented to the board by Judge W. H. Culver, largely signed by the tax-payers of the county, asking to have the bonds of said railroad company which the county now holds or may become entitled — offered for sale in the manner prescribed by law, and in order to encourage the speedy building of said railroad to the San Pedro valley, that the board accept any bid of said company on the basis of twenty-five cents on the dollar for said bonds

with coupons attached, payable in cash or Pima County
122 bonds at par, at the option of said company—provided that said bonds are not to be delivered nor payment required until sixty miles of said road is in operation and the majority of the Globe trade is turned over said railroad to Tucson,—and provided further that said sixty miles of road shall be completed and the said Globe trade shall be so turned within eighteen months from the first of January next.

On motion it was ordered that the clerk of this board issue an order to the county treasurer to forthwith advertise said Narrow *Guage* Railroad bonds for sale, in compliance with chapter 9, section 225, page 68 of the Compiled Laws.

December 31st, 1886.

Matters pertaining to the Narrow *Guage* Railroad Company coming before the board and Supervisor Handy being an interested party withdrew from the board and Probate Judge J. S. Wood entered and took his seat according to law.

Chairman Mansfeld reported that county treasurer has peremptorily refused to advertise for sale *of* the Narrow *Guage* Railroad bonds and calls attention of the new board to that fact.

January 4th, 1887.

Whereas, certain proceedings having been had by the board of supervisors of this county on the 30th day of November, 1886; in which the county treasurer of Pima county was directed to advertise for bids of bonds of the Arizona Narrow *Guage* R. R. Co.
123 and it appearing that the late county treasurer refused, or neglected to make such publication as required by law.

It is ordered, that the county treasurer of Pima county be and he is hereby directed to make such publication of notice for the space of four weeks, for sealed proposals for the purchase of all the bonds of the Arizona Narrow *Guage* R. R. Co., now in the hands of said Pima county, or to come into their hands, the same to be advertised in a newspaper published in said county for the period of four weeks.

February 15th, 1887.

Now comes John S. Wood, county treasurer of Pima county and asks the board to specify the amount of Narrow *Guage* railroad bonds that he shall sell under the bid made and filed with him for the sale of such bonds, and the board, in their judgment, believing that it will be for the best interests of all parties concerned, it is resolved, that said John S. Wood, county treasurer, be and he is hereby advised to accept the bid of said Narrow *Guage* R. R. Co. for all of the bonds of said company now in his hands, or that may hereafter come into his hands, to be done in full conformity with the bid of said company now on file in his office, a copy of which is on file with this board.

February 17th, 1887.

The matter of the sale of the Arizona Narrow *Guage* R. R. bonds now in the hands of the county treasurer of this county
124 or that may hereafter come into his hands, coming on regularly to be heard, and it appearing that John S. Wood, county treasurer has made publication of notice of such sale according to law; that said Arizona Narrow *Guage* Railroad Company were the only bidders for said bonds, and that their bid for said bonds is for twenty-five cents on the face value of said bonds (without interest) payable in the county bonds of Pima county at their face value (without interest) and a contract or agreement for the sale and surrender of said bonds and for the payment therefore having been this day made, executed and signed in triplicate by this board of supervisors and John S. Wood, county treasurer, on behalf of Pima county, and by the Arizona Narrow *Guage* Railroad Company, by their president and secretary and W. W. Walker, contractor on behalf of said Arizona Narrow *Guage* Railroad Company, fully covering the conditions of said sale and payment for said bonds, one copy of which said contract or agreement is on file with this board.

It is ordered, that sale of said bonds as provided in said bid and contract or agreement be and the same is hereby confirmed and approved, and

It is further resolved, that the chairman and clerk of this board are hereby authorized to officially sign and execute said contract or agreement and that said agreement or contract is hereby confirmed and approved.

125 July 1st, 1887.

The territorial board of equalization having reported to this board the length of the main track and the assessed value of the Southern Pacific Railroad Company in the county, and the length of the main track and the value of the New Mexico and Arizona Railroad Company in this county, and the length of the main track and assessed value of the Arizona Narrow *Guage* Railroad Company in this county, which appears the following to wit:

The Southern Pacific Railway Company main track in Pima county 63.25 miles with assessed valuation of same including *pro rata* of the rolling stock, real estate and improvements on right of way $638,989.39.

The New Mexico and Arizona Railroad Company in this county, main track 52.40 miles with valuation of same including *pro rata* of the rolling stock, real estate and improvements on right of way $317,081.43.

The Arizona Narrow *Guage* Railroad Company in this county, 9 miles and rolling stock $37,000.00 with an additional 30 % thereon assessed by the said board for non-return making a total of $48,100.00 assessed to said railroad company.

It is ordered, that the county assessor of Pima county enter said statement upon the assessment-roll of said county with the descrip-

tion under their proper heads and the total assessment properly carried out.

And the clerk of said board is hereby ordered to further
126 the county assessor with a certified copy of the detailed statement of the said territorial board of equalization with a certified copy of this order.

July 6th, 1888.

The territorial board of equalization having report- to this board the length of the main track and the assessed value of the Southern Pacific Railroad Company in this county, and the length of the main track and the assessed value of the New Mexico Railroad Company in this county, and the length of the main track and the assessed value of the Arizona Narrow Guage Railroad Company in this county, which appears as follows, to wit:

The Southern Pacific Railroad Company, 63.25 miles, with the assessed valuation of same, including the *pro rata* of the rolling stock, real estate and improvements on right of way, $506,000.

The New Mexico and Arizona Railroad Company in this county, main track 52.4 miles, with valuation of same, including *pro rata* of the rolling stock, real estate and improvements on right of way, $330,190.84.

The Arizona Narrow Guage Railroad Company in this county is 10 miles and rolling stock $40,000 with additional 30 % thereon assessed by said board for non-return, making $52,000 as the total assessment of said railroad company.

On motion, all members present voting "aye," it is ordered
127 that the county assessor of Pima county enter said statement upon the assessment-roll of said county for the year 1888, with the description under their proper heads and the total assessment properly carried out, and the clerk of this board is hereby ordered to furnish the county assessor with a certified copy of the detailed statement of said territorial board of equalization and also with a certified copy of this order.

The foregoing being copies from the minutes of said board and all the proceedings of said board are included in the same.

The petitioners allege that the said bonds, in the petition mentioned, after they had been delivered to the said railroad company, were sold by the railroad company in public market; that they were sold upon the representation of the then members of the board of supervisors and the then treasurer of said county, and upon the recommendation and assurance of the leading business men of Pima county that the said bonds were valid, binding negotiable obligations of the county, and that the county was amply able and *were* willing and anxious to pay the same, and upon such representations, so made, the said bonds were sold at an adequate value, and went into the market to be exchanged from hand to hand by purchase by the bearer, and without endorsements, and, like other commercial paper, to be transferred by delivery only, and that the purchasers of

said bonds bought the same in good faith and paid the full value
128 therefor in cash; and the proceeds of said Pima County bonds were used by said railroad company in the construction of the railroad to Tucson, northerly as aforesaid, or in payment of obligations and debts incurred in such construction, and a large part of the same was paid to residents of and citizens of the said county of Pima, all of which was done with the full knowledge and approval of the board of supervisors of said county. The said petitioners purchased the said Pima County bonds in good faith and without any knowledge or notice of any kind of any fact or circumstances alleged in the said answer of defendants which they the defendants maintain or allege rendered or tended to render the said bonds illegal; and that the prior holders of said bonds likewise purchased the same in good faith and for full value and without any knowledge or notice of any such fact or circumstance.

The foregoing allegations are hereby made in reply to each and every of the subdivisions of said answer as fully and particularly as though each subdivision of said answer was specifically designated and all of said foregoing allegations specifically repeated as to each subdivision of said answer.

III.

That said petitioners allege that the said subdivision II does not state facts sufficient to constitute any defense to said petition, and offers no reason why the prayer of the petition should not be
129 granted, and the defense therein set up has been fully adjudicated in the Supreme Court of the United States in this case, and should not now be heard and considered, and the filing of the same is in contempt of the mandate of said court, and for answer to the said subdivision petitioners deny each and every of the material allegations thereof.

IV.

As to the subdivision III of said answer, the petitioners aver that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto petitioner- say that the issues therein presented have been decided by the supreme court of this Territory to constitute no defense whatever in this case, and to reassert the same is in contempt of the mandate of the Supreme Court.

V.

As to subdivision IV of said answer, petitioners assert and allege the same as to the third subdivision, and for answer thereto the petitioners allege that they acquired the bonds specified and set forth in the petition in good faith and for full value and in open market, and that the same had long before that time been sold and exchanged in good faith and in compliance with the act of legislature by which they were authorized, as heretofore and herein alleged by the exchange of the first-mortgage bonds of said railroad company

for the said bonds specified in the petition herein, and the
130 said bonds were sold and exchanged in good faith to innocent purchasers thereof in open market, and by divers and sundry transfers and sales they became the property of the petitioners.

VI.

With reference to subdivision V of the said answer, petitioners defend and say that the same does not state facts sufficient to constitute any defense to said action or show any reason why the prayer of the petition should not be granted, and for answer thereto said petitioners disclaim and deny that any memorial to Congress is any part of this legislation and has any binding force or effect upon the laws which may be passed by Congress, and they allege that the said memorial by its terms and by fair construction thereof upon its face includes the advise and request of the said legislature of the Territory of Arizona to validate the said bonds specified in the petition; but whether the same does or not the act itself of Congress validates them, and that being true, the said memorial can have no force or effect whatever.

And the said petitioners allege that the said bonds and coupons are and were the outstanding bonds of Pima county, sold and exchanged in accordance with the laws, and the validity thereof has been made clear and certain by the act of Congress, which has removed all doubt which may have existed heretofore as to their validity.

131 VII.

As to the statute of limitations asserted in subdivision VI of said answer, petitioners allege that the cause of action begun and accrued on the 6th day of June, 1896, and that the statute of limitations commenced to run from that date, and not before, and the time in which an action could be brought therefor has not yet expired, and hence petitioners allege that the said subdivision does not state facts sufficient to constitute any defense to said cause, or any reason why the prayer of the petition should not be granted.

VIII.

As to subdivision VII of said answer, the petitioners defend and say that the same does not state facts sufficient to constitute any defense, and shows no reason why the prayer of the petition should not be granted, and for answer thereto the petitioners allege that by the decision of the Supreme Court in this case it was decided that this suit is against the Loan Commissioners of the Territory of Arizona, whoever the individual may be, and that this court has been directed by a mandate of that court to take such steps as may be necessary, and such action as may be required in accordance with the opinion and decision of the Supreme Court of the United States, and hence petitioners allege that this court in obedience thereto, and in pursuance thereof, must disregard the said subdivision VII
132 of said answer, and petitioners ask that the same be stricken out and utterly disregarded by this court.

And the petitioners allege that if it be true, as stated, that the said Franklin has departed this life, the attorneys who signed said answer have no right or authority to appear for him, and the petitioners request and asks the court that a rule be entered against the attorneys who have filed the answer to this case and entered the appearance, and to show by such appearance for whom they appear in this case and for whom and on behalf of whom this answer is filed, and whom they represent in filing the same.

IX.

As to subdivision VIII of said answer, the petitioners deny the allegations of said answer that the said legislature of the Territory of Arizona repealed the loan commission of Arizona, and that the loan commission no longer exists; and petitioners allege that the legislature of the Territory of Arizona had no power to repeal the same, and that any attempt to do so is void and of no force and effect.

X.

As to subdivision IX of said answer, petitioners allege that the holders of said bonds alleged in such petition had and have the right by law to have their bonds funded in accordance with the acts of Congress and the acts of the legislature of the Territory of Arizona, whether it be the wish of the county of Pima to have the same funded or not, and for further answer to the said subdivision
133 IX of said answer, petitioners state that the county of Pima is not a party to this suit; the answer is not filed for or on behalf of said county upon its face, and the allegations as to the wishes of the county of Pima can have no weight or consideration in this court.

XI.

As to subdivision X of said answer, the petitioners state that the same does not state facts sufficient to constitute a defense to said action, nor does it offer a reason why the said prayer of the petition should not be granted; and in answer thereto petitioners deny specifically the allegations that the bonds owned by the petitioners were not sold or exchanged in good faith, in accordance with the laws of the Territory, and they assert and allege that the said bonds were sold and exchanged in good faith, in accordance with the act of the legislature of the Territory of Arizona under which they were issued, and the same were sold to purchasers in good faith and for valuable consideration in open market, and that they became the property of the petitioners by purchase and for valuable consideration before the said bonds were due, and hence they allege that the same are valid outstanding bonds of the county, and that the holders thereof have the right to have them funded according to the laws of Congress and the laws of the Territory of Arizona, and to have the petition in this case granted and allowed by this court.

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XII.

As to subdivisions XI, XII, XIII, XIV of said answer, petitioners deny that said railroad company was insolvent as alleged; deny that the said company never built and that it never operated any part of the railroad to be built according to its said articles of incorporation, or any railroad whatever; and deny that immediately after it came into possession of the bonds of Pima county it ceased all appearance of business and pretense of doing business, and deny that the said bonds of the said railroad company have at all times been worthless; and with reference thereto the petitioners have heretofore fully answered, and as to the facts upon which the same were issued, in II subdivision of this reply.

And said petitioners further deny the fourteenth subdivision of said answer, and reassert with reference thereto the allegations of subdivision II of this reply.

XIII.

With reference to subdivision XVI of said answer, petitioners deny that the statute of limitations has run against any of the coupons of said bonds, and the same became validated by act of Congress of June 6, 1896, and that time for commencing the action thereon has not yet expired.

XIV.

As to paragraph XVII of said answer, petitioners allege that the same does not state facts sufficient to constitute a cause of
135 action or to make a claim or set-off in said cause, and further, that there can be no claim or set-off made in a suit of this kind, which is a suit for a mandamus, and that no set-off can be made as against petitioners, the *bona fide* holders of said negotiable Pima County bonds; and again, that the loan commissioners of Arizona can have no claim or set-off with reference thereto, as the said Narrow Guage bonds are not bonds which are owned by said loan commissioners of the Territory of Arizona, but are the property of the county of Pima, and the county of Pima is not a party to this suit.

Wherefore, the petitioners pray that the prayer of the petition be granted, and that the answer therein be disregarded, and for such other and further relief as the law or equity affords.

BARNES & MARTIN,
DILLON & HUBBARD,
Att'ys for Petitioners.

136 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER and THE EXECUTORS OF THE ESTATE OF ELIZABETH B. VOORHIES, Petitioner-,
against
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

TERRITORY OF ARIZONA, *County of Pima*, } ss:

William H. Barnes being first duly sworn on oath states that he is the agent of the petitioners in this behalf and that the facts alleged in the foregoing reply are true in substance and in fact.

Subscribed and sworn to this 10th day of November, 1899.

WILLIAM H. BARNES.

Subscribed & sworn to before me this 10th day of November 1899.

JOHN H. MARTIN,
[SEAL.] *Notary Public.*

Commission expires March 31, 1903.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Utter, *et als. vs.* Loan Commissioners of Arizona. Amended reply. Service by copy admitted this 10th day of November, 1899. C. W. Wright, attorney for respondents. Filed Nov. 11th, 1899. Lloyd Johnston, clerk. By Angie B. Parker, deputy.

137 In the Supreme Court of the Territory of Arizona, January Term, 1900.

UTTER ET AL.
vs.
FRANKLIN ET AL.

Come now the respondents herein by C. W. Wright and Rochester Ford, of counsel, and not waiving their motion to have this case dismissed on the ground that there are no loan commissioners of the Territory of Arizona, move the court, if the court takes jurisdiction of this case, to order the questions of fact to be tried before a jury and to postpone the argument until such trial can be had and the verdict certified to this court, and respondents further move the court to designate Pima county as the county in which the said questions of fact shall be tried, if they are tried at all. And in support of this motion, respondents represent to the court that, as shown by the pleadings herein, the records of the board of supervisors of Pima county, on which records both of the parties hereto rely, are in the said Pima county, and cannot be removed, and that all the witnesses in this case who reside in the Territory of Arizona reside in said Pima county, and that counsel in the case also reside in said Pima county; and that it will be for the aforesaid reasons more convenient and

expeditious to try the said case in Pima county rather than in
138 any other county of the Territory of Arizona.

Respectfully submitted.

C. W. WRIGHT,
ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Utter *et al. vs.* Franklin, *et al.* Motion for jury trial in Pima county. Filed Jan. 15–1900. Thomas Grindell, clerk.

139 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

William H. Barnes being first duly sworn on oath states: That he is the agent of the petitioners in this behalf; that said petitioners desire to take the depositions of the following-named witnesses, viz: J. F. J. Gouley, Albert Brown, A. Q. Duryee, J. E. Graham, executor of the estate of Esther Graham, E. L. Zabriskie, Wm. A. Maginnis, executor of the estate of E. B. Voorhees, E. B. Blossom, A. L. Bosworth executrix of the estate of H. C. Bosworth, John Morehouse, John Morehouse, executor of William Morehouse, James L. Utter, executor, Z. J. Brown, Mrs. M. T. Brown, executrix H. R. Brown, H. C. Brewster, executor Mary A. Robinson, James L. Utter, Jasper Westervelt, Theodore Hill, Steve Tompkins, Thos. E. Packer, Mrs. L. B. Seaver, John Greene, and J. M. Thomas, and W. N. Color, and Frank Coler and Harry Hubbard. Affiant states that none of said witnesses are residents of the Territory of Arizona, and that they
140 reside in the State of New York, and in or near the city of New York; the place where each of them is to be found is by their post-office address which is city of New York, care of Dillon & Hubbard, Western Union building in said city.

And further affiant saith not.

W. H. BARNES.

Subscribed and sworn to before me this 3rd day of February, A. D. 1900.

[SEAL.] JOHN H. MARTIN,
Notary Public, Pima County, Arizona.

My commission expires March 31, 1903.

(Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter, *et al.* petitioner-, *vs.* Loan Commissioners of the Territory of Arizona. Affidavit of non-residence of witnesses, in support of application for issuance of a commission to take testimony. Filed Feb. 5, 1900. Thomas Grindell, clerk.

141 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

TERRITORY OF ARIZONA, *Maricopa County,* } ss:

Alfred Franklin being first duly sworn on oath states; that as the agent for petitioners he served the notice and interrogatories to which this is attached by handing a copy thereof to C. F. Ainsworth, the attorney general of the Territory of Arizona, and also a copy to Charles H. Akers, secretary, and George W. Vickers, auditor of the Territory of Arizona, on the 6th day of February A. D. 1900, and Hon. N. O. Murphy, governor of Arizona, on the 7th day of February, 1900.

ALFRED FRANKLIN.

Subscribed and sworn to before me this 6th day of February A. D. 1900.

THOS. ARMSTRONG, JR.,
[SEAL.] *Notary Public, Ariz.*

My commission expires March 21, 1901.

142 In the Supreme Court, Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA, Respondents.

To C. F. Ainsworth, C. W. Wright, Rochester Ford, attorneys for respondents.

SIRS: You and said respondents are hereby notified that five days after the service hereof, I as attorney for the petitioners shall apply to the clerk of the supreme court in and for said Territory for a commission to take the depositions of J. F. J. Gouley, Albert Brown, A. Q. Duryee, J. E. Graham, executor of the estate of Esther Graham, E. L. Zabriskie, William A. Maginnis, executor of the estate of E. B. Voorhees, E. B. Blossom, A. L. Bosworth, executrix of the estate of H. C. Bosworth, John Morehouse, John Morehouse executor of William Morehouse, James L. Utter, executor, Z. J. Brown, Mrs. M. T. Brown, executrix H. R. Brown, H. C. Brewster, executor Mary A. Robinson, James L. Utter, Jasper Westervelt, Theodore Hill, Steve Tompkins, Thos. E. Packer, Mrs. L. B. Seaver, John Green and J. M. Thomas, W. N. Color and Frank Color and Harry Hubbard, who reside, or who are to be found in the State of New York and
143 in or near the city of New York, and the post-office address of each of them is the city of New York, State of New York

care of Dillon & Hubbard, Western Union building in said city; in answer to the interrogatories attached hereto, to be read as evidence in behalf of the petitioners on the trial of said cause.

DILLON & HUBBARD,
BARNES & MARTIN,
Att'ys for Petitioners.

Interrogatories to be Propounded to Each of the said Witnesses in Behalf of Petitioners.

First interrogatory. What is your name, age and business?

Second interrogatory. Have you at any time been an owner of any of the bonds of Pima county, Arizona payable to the Arizona Narrow Guage Railroad Company, issued July 1st, 1883, and if you answer "Yea," please state how you became the owner of the same; how much, if anything you paid for them; how long you owned them.

Third interrogatory. State fully and completely any facts or circumstances you may know with reference to the purchase, sale and delivery of said bonds at any time.

In addition to the foregoing interrogatories, there shall be propounded to W. N. Coler, and to Frank Coler, the following interrogatories.

144 A. State fully all that you may know with reference to the purchase, sale, delivery, or exchange of said bonds from the time you first had any knowledge thereof to the present time?

B. If you, or either of you have now in your possession any letter or letters, signed by officers of Pima county, bankers, professional men, or citizens of Pima county, with reference to the value, validity, or desirability as an investment, of said bonds, please attach said letters to your deposition in answer to this question as a part thereof.

To the said Harry Hubbard, in addition to the said first three interrogatories, there shall be propounded the following interrogatory:

I. Are you of counsel for petitioners in this behalf.

II. Have you now in your possession any of the bonds aforesaid as the attorney for petitioners, if so, state how many, and give the consecutive numbers of the same, and state the number of coupons still attached to said bonds, if any; and the number of coupons that have been detached from said bonds, if any; describing fully the same, and also please give to the commissioner and attach to your deposition a copy of bond No. 1; and a copy of one of the coupons attached thereto, and the numbers of the said coupons attached to said bond, and the numbers of any you may have that are detached from said bond; produce all of the said bonds which you have, and coupons aforesaid before the said commissioner, and describe in answer to this question, clearly and fully what you so produce.

III. As such attorney have you the custody and control of the said bonds and coupons for and on behalf of petitioners, ready to be

exchanged and funded as prayed for in the petition, and are you ready to make the exchange prayed for, if the said loan commissioners shall be ordered and directed so to do.

To all of said witnesses the following general interrogatory is to be propounded:

State any other fact or produce and attach to your deposi-
145 tion any document you may have of benefit to the petitioners in this case.

DILLON & HUBBARD,
BARNES & MARTIN,
Attorneys for Petitioners.

(Endorsed:) No. 546. In the supreme court, Arizona. James L. Utter, *et al. vs.* Loan Commissioners of the Territory of Arizona. Notice of intention to apply for commission to take testimony; with interrogatories attached. Service by copy admitted this 6th day of February, 1900. Rochester Ford, of counsel for respondents. Geo. W. Vickers territorial auditor; C. H. Akers, secretary of Arizona; C. F. Ainsworth, att'y general. N. O. Murphy, governor. Filed Feb. 7, 1900. Thomas Grindell, clerk.

146 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER, GEORGE ALBRIGHT, WESLEY ALBRIGHT, and William H. Maginnis, Executors of the Last Will and Testament of Elizabeth Voorhies, Deceased, Petitioners,

vs.

B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Composing the Loan Commission of the Territory of Arizona, Respondents.

Motion to Dismiss.

Comes now C. F. Ainsworth, attorney general of the Territory of Arizona, and moves this court to dismiss this action, for the reason that all of the officers against whom said action was commenced have long since the filing of the petition for writ of mandamus herein, and prior to the filing of this motion ceased to be officers of the Territory of Arizona, and of the loan commission of said Territory, by reason of their terms of office having expired, of all which this court takes judicial notice. And that the present officers of the Territory of Arizona are N. O. Murphy, governor; Charles H. Akers, secretary, and George W. Vickers, auditor.

C. F. AINSWORTH,
Attorney General.

(Endorsed:) No. 546 In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* B. J. Franklin, *et al.* Motion to dismiss. Rec'd copy of this motion March 24, 1900 Barnes & Martin, att'ys for petitioners. Filed M'ch 26, 1900. Thomas Grindell, clerk.

147 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET ALS., Respondents.

C. W. Wright being first duly sworn on his oath says: That he is the senior counsel in the above-entitled cause. That on January 29, 1900, he was taken seriously ill, being afflicted with appendicites and mountain fever. That by reason of said illness, affiant was confined to his bed and was wholly unable to attend to any legal business until March 20th, 1900, at which time affiant returned from Santa Monica, California, whither he had been sent by his physician to expedite his recovery to strength. That on affiant's said return it was then too late to take the deposition of Walter L. Vail who resides in Los Angeles, California, by whom affiant expects to prove that at the time of the bonds in controversy herein were executed he was a member of the board of supervisors of Pima county, Territory of Arizona. That theretofore said Arizona and Narrow Gauge Railroad Company had made frequent and urgent demands on said board that said bonds be executed. That said board was earnestly opposed to the issuance and delivery of said bonds and for the reason that it did not believe
148 that said line of railway would ever be built by the ones then proposing to construct it, and for that reason refused to make and execute said bonds. That afterwards the district attorney of said county, long since deceased, who was made by law the legal adviser of said board, instructed said board that the statute authorizing the execution of said bonds was mandatory; that no discretion as to their execution was left to said board; but that, on the contrary thereof, said board was commanded by said statute to execute the same; and that its refusal so to do was an express and willful disobedience of the plain commands of the law and would assuredly get the individual members of said board into serious trouble. That thereupon and by reason only of said advise, said board did cause said bonds to be made and executed. That upon their execution said board having no safe place in which to keep them and there being an iron vault connected with the office of the treasurer of said county said board caused the treasurer of said county to come before it. That said board did thereupon carefully instruct said treasurer to take into his possession to deposit the same in said vault and to safely and securely keep the same, subject to the further orders of said board only and not to deliver them to any one on any account whatsoever until so ordered to do by said board; that said treasurer did thereupon receive said bonds promising the board that he would put the same in said vault, would safely and se-
149 curely keep them therein and would not deliver them to any person or persons whomsoever, or on any account whatsoever save upon the instructions of the board first had so to do. That some time afterwards, but how long affiant is not informed, it was rumored on the streets of Tucson that said bonds had been delivered to

said railway company. That thereupon a special meeting of said board was called, and on it being assembled said treasurer was sent for and asked what he had done with said bonds. He replied that they were still in said vault. He was requested to produce them. He was gone to get them about a half an hour when he returned pale, trembling, and evidently frightened. He then informed said board that said bonds had disappeared; that he did not know who took them, and that they had been taken without his knowledge or consent.

That an unavailing effort was then made by said board to discover where said bonds were; that it was not until a long time afterwards that said board were informed that said bonds were then in New York. That said treasurer by his said search after said abstracted bonds as aforesaid discovered that the bonds of said railway company had been left in place of said abstracted bonds.

Affiant does not now know of any one by whom he can prove all of the above facts save M. G. Samaniego, who was then, as now, a member of said board; that said Samaniego does not now recall all of said facts with the certainty and clearness of said Vail, but
150 does remember them in a general way, and to this extent his testimony is material and will corroborate the evidence of said Vail. That prior to the said illness of affiant, after much inquiry, he discovered that the last known address of said treasurer was the Soldiers' Home in the District of Columbia. That affiant is informed that said treasurer when last heard from by affiant's informants was very old and decrepid; that if he is still alive affiant believes that he can find him and secure his deposition, if time sufficient be given therefor. That the deposition of said Vail in connection with other evidence that affiant is assured can be found, that the present real owners of said bonds well knew the above and foregoing recited facts prior to their coming into the possession of said bonds, renders said evidence of said Vail material and important; that but for affiant's said illness he would have caused said evidence to be taken as he verily believes and would now have the same on file. That this branch of the defense of said action was part of the work assigned affiant to investigate and to get the true facts properly before the court.

That until the incoming of this court in January last said cause stood upon a motion of petitioners to strike the amended return of respondents from the files; and until the decision of that motion respondents did not know whether any testimony could be taken in said cause or not and if so what testimony would be relevant
151 to the issues joined on the determination of said motion in whole or in part. That at said incoming said court denied said motion and set the case for hearing for final disposition on March 26, 1900.

That since said time of the setting of said case affiant has really been physically unable to give to said case any connected attention by reason of his illness as aforesaid; that upon his return to Tucson from said January session of this court he at once advised Rochester Ford, Esq., one of the associate counsel for said respondents, of the

setting of said case; that said Ford at once said that it was impossible to properly prepare said case for trial in the time allowed by the court; that thereupon said Ford and affiant wrote a letter to the attorney general of the Territory, requesting him to so advise the court at once; but what was done by said attorney general in that behalf affiant has not been advised.

Affiant further states that by reason of his said illness no consultation has been or could have been had with said *said* associate in reference to the preparation of said case for trial in time to prepare the same for trial.

That to the end therefore that justice may be done affirnt prays the court for further time in which to prepare said case for trial; that this time is not asked for the purpose of delay merely but that said respondents and the ones who will be obliged to pay said bonds in case they shall be adjudged valid obligations of said Pima
152 county desire only the time necessary in which to intelligently and fully present to the court all of the facts relevant thereto.

Affiant further states that on the day of the date hereof he was examined by his physician, Dr. Mark A. Rodgers, who instructed affiant that he was physically unable to enter upon any work requiring a continued mental strain he yet being physically too weak and that he believed the chances would be if affiant did enter upon such labor, that it would result in a relapse and to that end the said physician did make his certificate which is hereto attached and made a part hereof.

C. W. WRIGHT.

Subscribed and sworn to before me this 24th day of March, 1900.

LAUTARO ROCA,
[SEAL.] *Notary Public, Pima County, A. T.*

My commission expires Oct. 14, 1901.

153 Mark A. Rodgers, M. D., Tucson, Arizona, to the supreme court, Territory of Arizona:

This is to certify that Judge C. W. Wright is just recovering from a severe and dangerous illness and that I have this day examined him and find it imperative that he shall abstain from any severe or complicated work and that he is not in a physical condition to attend to the trial of any lawsuit or work requiring such exercion.

MARK A. RODGERS, M. D.

(Endorsed:) No. 546. Supreme court, Territory of Arizona. James L. Utter, *et al.* petitioner-, *vs.* B. J. Franklin, *et als.* respondents. Affidavit for continuance. Filed M'ch 26, 1900. Thomas Grindell, clerk.

154 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

Rochester Ford, of lawful age, being duly sworn makes oath and says that he is one of the associate counsel for respondents in this case; that he is associated therein with Hon. Charles W. Wright, of Tucson, Arizona; that said Charles W. Wright has been familiar since about the year 1889 with the history of the bonds issued by Pima county to the Arizona Narrow Guage railroad, being the same bonds in litigation in this case; that the said C. W. Wright is the attorney who was employed by Pima county to defend the suit wherein one Charles Edward Lewis brought suit against Pima county to recover on certain coupons which had been attached to certain of the said bonds; that this affiant was only lately called into the case; that on conference with said C. W. Wright as to the preparation and trial of the said case it was agreed that certain testimony should be taken by affiant and certain other testimony with which said C. W. Wright was more familiar should be taken by him: that affiant has, so far as possible, prepared the testimony
155 which it was deemed proper that he should take; that said C. W. Wright, soon after the setting of this case for trial, was taken seriously ill; that for many weeks he was confined to his bed and visitors were not permitted to see him; that said C. W. Wright was too ill to attend at the sessions at which testimony was taken herein and that he was also too ill to prepare any of the testimony which he had expected to take.

Affiant further states that in preparing this case for trial it became necessary in the opinion of said C. W. Wright and of affiant to take the testimony of the executors of said Charles Edward Lewis; that the address of said executors was requested of Messrs. Barnes and Martin, attorneys, of Tucson, Arizona, who were the attorneys for said Charles Edward Lewis in the case wherein he was plaintiff; that said address was not furnished because, as affiant was informed, it was not known, and that immediately thereupon affiant addressed communication to a firm of lawyers in London, England, asking for the names and address of the executors of said Charles Edward Lewis; that no reply to such letter of affiant has as yet been received; that the depositions of such executors are in the opinion of affiant, material and essential in this case, as it is expected that such deposition will show that Charles Edward Lewis knew at the time he acquired the bonds or coupons issued by Pima county, that there had been a failure of the consideration of the same, to wit, that the said Arizona Narrow Guage railroad had never been bullt and that
156 Pima county had refused to pay any interest on said bonds.

Affiant further states that it is material and essential in this case to take the deposition of one Charles E. Walker who was secretary of the said Arizona Narrow Guage Railroad Company; that the said Charles E. Walker lives in California: that the said affiant

wrote many letters both to places in California and otherwise endeavored to learn the address of said Walker; that affiant from his best recollection makes oath and says that he wrote no fewer than eight (8) letters to various persons before he was able to find where said Charles E. Walker resides; that his residence was not discovered in time to take his deposition in this case; that it is expected to take the deposition of said Charles E. Walker and to prove by him that all money for the construction of so much of the Arizona Narrow Guage railroad as was done, was furnished by the firm of W. N. Coler and Company of New York city; that said firm was familiar with all the facts connected with the issuance of the bonds herein and of the history of the said railroad company and that said firm of W. N. Coler & Co. in taking said bonds, knew at the time that the consideration therefor had failed, to wit, that the said railroad had never been built; and that it is further expected that said W. N. Coler & Co., before they took any of said bonds or coupons, knew that the same had been repudiated by Pima county, Arizona, and that the treasurer of said county had refused to pay any interest on said bonds and that the board of supervisors of said
157 county had by official order so instructed the treasurer to refuse to pay interest.

Affiant further states that interrogatories on behalf of plaintiff for the taking of the depositions of parties therein named was served on affiant early in the month of February, 1900; that immediately and within the time fixed by statute, affiant prepared cross-interrogatories and filed them with the clerk of this honorable court; that the depositions on said interrogatories and cross-interrogatories were not filed with the clerk of this court until the 20th day of March, A. D., 1900; that in the preparation of said interrogatories affiant was unable to confer with said C. W. Wright because the said C. W. Wright was then too ill to be spoken to; that some of the witnesses whose depositions were to be taken failed to give their depositions, and that it will be necessary to take them.

Affiant further states that the bonds and coupons sued on herein were not exhibited to the commissioner herein till the 21st day of March, 1900, and that a copy of the depositions taken herein was not seen by affiant till March 20th, 1900; that after inspecting said bonds, coupons and depositions, it became necessary in order to prepare the defense of this case to take further evidence in the city of New York and in the city of London, England and that it has been impossible to take such evidence before the day fixed for the sitting of this case. Affiant further states that it was impossible to
158 prepare for the trial and argument of this case in the short space of time between March 20th, 1900, and March 26th, 1900; that the preparation, trial and argument of this case involves the facts connected with one hundred and fifty separate bonds claimed to be owned by many separate owners, and also a careful study as to the facts connected with the coupons, amounting to thirty-eight hundred (3,800) or more, detached from said bonds, which coupons, as is claimed on the part of petitioners, have passed from hand to hand. Affiant makes oath and says that he has used

in the preparation of this case, the utmost diligence in his power and has given it the full attention which the importance of the case demands, and affiant represents that under all the circumstances it has been a matter of physical impossibility to prepare this case for trial in the time intervening between the day when this case was set and the day set for trial, to wit, March 26th, 1900.

Affiant further represents that the further evidence which will be taken herein is, in the opinion of affiant, absolutely necessary to a proper presentation of the defense herein and that the failure to take such additional testimony is not due to negligence, and that a continuance herein is not asked for for delay, but in order that justice may be done.

ROCHESTER FORD.

Subscribed and sworn to before me this 24th day of March, 1900.
[SEAL.] EMMA A. MILLER,
Notary Public, Pima County, Arizona.

My commission expires Oct. 12, 1902.

159 (Endorsed:) No. 546 In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *v.* B. J. Franklin, *et al.* respondents. Affidavit for continuance. Filed M'ch 26—1900, Thomas Grindell, clerk.

160 In the Supreme Court of the Territory of Arizona.

J. L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

Motion to Dismiss.

Come now respondents and move the court to dismiss the petition herein for the reason that the writ asked for would be unavailing, because the loan commission of Arizona has been abolished by act of the Arizona legislature, to wit, act No. 32 of the 20th Legislative Assembly.

ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Utter *et al.*, petitioners, *v.* Franklin *et al.*, respondents. Motion to dismiss. Service of copy acknowledged. March 27, 1900. W. H. Barnes, att'y for petitioners. Filed M'ch 27, 1900. Thomas Grindell, clerk.

161 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

Come now respondents by their attorneys and move that the petitioners herein be required to furnish security for costs, and in sup-

port of this motion respondents aver that as shown by the pleadings herein the petitioners are non-residents of the Territory of Arizona and have no property in said Territory.

ROCHESTER FORD,
Attorney for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *v.* B. J. Franklin, *et al.* respondents. Motion for security for costs. Service of copy acknowledged March 27, 1900. W. H. Barnes, att'y for petitioners. Filed M'ch 27—1900, Thomas Grindell, clerk.

162 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET ALS., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

TERRITORY OF ARIZONA,
Maricopa County, } ss:

C. W. Wright being first duly sworn says: That he is one of the attorneys in the above-entitled cause, aiding in the defense thereof. That since the last adjournment of said court the time of affiant has been largely taken up in his official duties. That affiant is a member of the code commission, which commission is now engaged in the work of revising the written laws of Arizona and has been for more than six months last past. That affiant has been compelled to give to said work almost his entire time and to the exclusion of nearly all other business; that because thereof affiant has not read and has had no opportunity to read the depositions taken in this case, nor any thereof; that affiant is, therefore, at this time, unable to present said case or to be of any aid to the court in its correct determination; that said work of revising the laws of Arizona is of great public importance, as affiant believes, and the same must be completed in time to have the revision and the com-
163 mission's report thereon printed by the next incoming of the legislature; and to that end, affiant has given his said time and has been compelled so to do.

Affiant further says that the issues involved in said cause and the amount at stake are of great importance and of dire consequence to the tax-payers of Pima county, that at this time affiant cannot present said cause, and, in the interest of fairness and justice, affiant asks that respondents be given further time.

C. W. WRIGHT,

Subscribed and sworn to before me this 1st day of June, 1900.

THOMAS GRINDELL,
[SEAL.] *Clerk Supreme Court.*

(Endorsed:) No. 546. In the supreme court, of the Territory of Arizona. Jas. L. Utter, *et al. vs.* B. J. Franklin, *et al.* Affidavit of Judge C. W. Wright. Filed June 1st, 1900. Thomas Grindell, clerk.

164 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Respondents.

TERRITORY OF ARIZONA, *Pima County,* } ss:

Rochester Ford, of lawful age, being duly sworn according to law, makes oath and says, that he is of counsel for the respondents in the above-entitled cause: that since the last session of this honorable court, he has endeavored in conjunction with Hon. Charles V. Wright, with whom affiant is associated, to prepare this case for a hearing at this present session of court; that the deposition of one Charles E. Walker was material and indispensable herein; that affiant endeavored to locate said Walker, and after trying unsuccessfully for a long time to learn his address, did find that he lived at the place called Long Beach, California, that affiant made a trip to said place to ascertain certain evidence from said Walker, who had been the secretary of the Arizona Narrow Guage Railroad Company, and after learning from him that he knew facts out of which this controversy arose, affiant prepared interrogatories and caused the deposition of said Charles

165 E. Walker to be taken; that the same was not received till May 29, 1900; that affiant also prepared interrogatories for the further depositions of Leonard Hole and W. N. Coler, Jr.; that the same were promptly forwarded to New York, but were not returned till a late date, to wit, May 26, 1900; that Bryan W. Tichenor, to whom the interrogatories and cross-interrogatories were sent wrote this affiant as follows, under date of May 21, 1900: "It was only after the most persistent and repeated calls upon these people that the notary was able to induce them to give their answers to the interrogatories. By this I do not mean to charge them with contumacy, but they certainly were most dilatory and neglectful;" that the original of said letter is hereto attached for the inspection of the court; that said depositions were not received, because of the delay of said Hole and W. N. Coler, Jr., in time for inspection and sufficient preparation of this case.

Affiant further states that the district court of the first judicial district of the Territory of Arizona, of the bar of which court this affiant is a member, has been in session all or a great part of the time since the last session of this honorable court; that affiant has been almost constantly engaged in the trial and argument of cases in said court, and that his entire time has been consumed in the duties in said court and in the taking of the depositions herein.

166 Affiant further states that it has been a matter of physical impossibility for him, and he believes that it would have been impossible for any one else, to attend at the session of the said district court and also to prepare this case for trial; and that affiant has not been able to and has not, for the reasons above stated,

studied the testimony herein as he would do if further time were granted.

Affiant further states that the facts out of which this cause of action arose date back to the year 1882, and that the evidence taken herein is voluminous; that the questions of law and fact involved are such as require far more time than has elapsed since the last session of this honorable court, and that the setting of this case to be heard at this time was too soon a setting for the proper preparation and argument of the said cause.

Affiant further represents to this court that in his opinion the interests of his clients demand further time for the preparation of this case and that his clients' interests will be jeopardized unless further time is granted, and affiant further states that this application is not made for delay, but that the interests of justice may be subserved.

ROCHESTER FORD.

Subscribed and sworn to before me this 31st day of May, 1900.

WILEY E. TUSSING,
[SEAL.[*Notary Public, Pima County, Arizona.*

My commission expires April 29, 1901.

167 NEW YORK, *May* 21, 1900.

Rochester Ford, Esq., counselor-at-law, Tucson, Arizona.

MY DEAR MR. FORD: Herewith I hand you carbon copy of depositions of Leonard Hole and W. N. Coler Jr. in case of Utter *v.* Franklin *et al.*, as per your directions under date of April 28th, last. The original has been, today, forwarded to clerk of supreme court at Phœnix, as directed.

In explanation of the bill for same, herewith enclosed, I want to say that I turned over the matter to one of my associates—Mr. Woodle, who is a notary (I am not), and it was only after the most persistent and repeated calls upon these people that he was able to induce them to give their answers to the interrogatories. By this I do not mean to charge them with contumacy, but they certainly were most dilatory and neglectful. The amount charged does not compensate for the time consumed in the effort to get them to give their answers, but because the depositions were so short I did not see how I could very well charge more.

Yours truly, BRYAN W. TICHENOR.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *vs.* B. J. Franklin *et al.* respondents. Affidavit of Rochester Ford. Filed June 1st, 1900. Thos. Grindell, clerk.

168 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
LOAN COMMISSIONERS, ETC., Respondents.

Whereas this cause was submitted by order of the court upon abstract and briefs to be thereafter filed without formally offering, presenting or reading the evidence of the respective parties. It is stipulated, that all the evidence produced, exhibited, taken and reported by C. D. Hoover the referee appointed by the court, including all documents offered and all original evidence introduced and exhibited, and reported by him as having been exhibited and offered, and the testimony of witnesses for the respective parties taken before him all of which is contained in his report is offered to the court and introduced by the respective parties as appears in his report, and the exhibits thereto attached and depositions of the witnesses, together with the stipulations of the parties appearing in said report are all submitted to the court for consideration, and any objection may be urged in the briefs of counsel and presented to the court for consideration to any and all of said evidence that might have been made or urged to the court had the same been offered in open court upon the trial of the cause, and at the time the same was offered. And either party
169 may take and preserve exceptions to each and every ruling against him by the court upon the final decision of said cause, as fully and completely as if objection, ruling and exception had been made at the time such evidence would have been offered in the ordinary course of trial in open court. And it is further stipulated, that all the depositions including that of Walter L. Vail which have been taken under stipulation or notice, or which may be taken upon stipulation or notice heretofore made but not yet returned and filed with the clerk are regarded as submitted subject to such objection as could properly be urged if the deposition was read in open court.

Dated June 9, 1900.

BARNES & MARTIN,
Att'ys for Petitioners.
C. W. WRIGHT,
ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* Benjamin J. Franklin *et al.* Stipulation. Filed June 11th, 1900. Thomas Grindell, clerk. By Angie B. Parker, deputy.

170 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHEES, Plaintiffs,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Defendants. } No. 546.

Barnes & Martin, attorneys for plaintiffs.
C. W. Wright and Rochester Ford, attorneys for defendants.

Opinion of Sloan, J.

The plaintiffs, December 31, 1896, filed their petition in this court, which prayed for a writ of mandate to compel the defendants, who were then respectively, governor, auditor and secretary of the Territory and who, by virtue of holding said offices at the date of the filing of said petition, were the loan commissioners of the Territory, to fund the bonds and the interest due thereon issued by Pima county in aid of the Arizona Narrow Gauge Railroad Company under the provisions of a territorial act of February 21, 1883. The defendants demurred to the petition and by way of answer, set up that the bonds sought to be funded, in the suit of Lewis *vs.* Pima County, by the district court of said Pima county were de-
171 clared to be void and of no binding obligation upon the said county; that the judgment of the district court was upon appeal, affirmed by the supreme court of the Territory; and on appeal from the judgment of this court, the latter was affirmed by the Supreme Court of the United States; that the judgment so rendered and affirmed in the Lewis case, was *res adjudicata* and binding upon the plaintiffs in this suit.

The records of this court in the present case show that the demurrer to the petition was sustained and the petition dismissed, whereupon an appeal was taken to the Supreme Court of the United States. The latter court reversed the judgment of this court, and remanded the cause "for further proceedings not inconsistent with the opinion."

Utter *vs.* Franklin, 172 U. S. 424.

In the opinion the Supreme Court held that the judgment in the case of Lewis, holding that the bonds were invalid because the territorial legislature had no authority to authorize their issuance under the organic law, "was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and under the legislation then existing." That the act of Congress of June 6, 1896 cured this defect and validated the territorial act of February 21, 1883, and made it the duty of the loan commissioners to fund the bonds in question. Upon the filing of the mandate of the Supreme Court in this court, the de-

fendants asked leave to file an amended return raising
172 new issues of fact and setting up that the bonds in question were, "not sold or exchanged in good faith and in compliance with the act of the legislature by which they were authorized," and so were not of the class of bonds validated by the act of June 6, 1896 and required to be funded thereby. Leave to file this amended return was granted for the reason that the record in this court, where the cause originated, discloses that the judgment of this court from which the appeal was taken to the Supreme Court of the United States, was rendered upon the issue of law raised by the demurrer, and not upon any issue of fact raised by the original return. We took the view that in the state of the record, the mandate of the Supreme Court reversing the cause and remanding it to this court "for proceedings not inconsistent with the opinion," made it our duty to consider and decide any issue of fact properly pleaded, which amounts to a defense and which is not in fact decided by the Supreme Court in passing upon the issue of law presented by the demurrer; that under the law and practice regulating appeals of this character, such a mandate being general in its terms, is to be construed as justifying this court in considering and deciding any question left open by the mandate and opinion of the appellate court.

Ex parte The Union Steamboat Company, 178 U. S. 318.

The issue of fact raised by the amended return and which, in our view, was left open by the opinion and mandate of the Su-
173 preme Court, involves the question as to whether the bonds were exchanged by the county of Pima for the bonds of the Arizona Narrow Gauge Railroad Company in good faith and in compliance with the act of the territorial legislature of February 21, 1883. Upon the order permitting the defendants to file their amended return being made, a commissioner was appointed to take and report the testimony which the parties might desire to put in, bearing upon the new issue of fact raised by the amended return. The evidence has all been taken and is now before us.

The defendants now present two objections to the granting of the writ of mandate, which arise out of facts that did not exist at the time the case was heard in this court on the demurrer. These are, first, that the action was begun against Benjamin J. Franklin, governor, C. P. Leitch, auditor and C. M. Bruce, secretary, and that each of the defendants has long since been superseded in office by another person and that therefore the action should abate. Second, that the loan commission has ceased to exist by repeal of the statute creating the same, and no provision was had in the repealing statute reserving from its operation pending proceedings, and that therefore the action must abate because there is no officer or person upon whom the duty rests to fund the bonds in question or against whom the writ of mandate may be enforced.

174 Upon the first point raised, we deem it sufficient to say, that the weight of authority in the State courts is in favor of the view that the writ of mandamus operates on the office rather than on the individual who occupies the office, and therefore does not

abate by a change of person-el in the office, and that no revivor is necessary against a successor of the officer against whom the proceedings were instituted. This also appears to be the rule as followed in the Supreme Court of the United States whenever a proceeding is to enforce a continuing duty against a corporation or municipality.

Thompson *vs.* U. S., 103 U. S. 482;
Commissioners *vs.* Ballou, 99 U. S. 624.

The loan commissioners were by the statute creating the board, made a continuing body, and the delinquency complained of, related to a continuing duty of the commission, and we see no reason why the doctrine as applied in the above cases, does not apply to the present proceeding.

Hollen Parker, petitioner, 131 U. S. 221.

The question as to whether the loan commission has been abolished, is one which involves a consideration of not only the appealing statute, but as well, the various acts, congressional and territorial, relating to the creation of the commission, its duties and the general subject of funding. In the Revised Statutes of 1887 there was incorporated as "title XXXI," an act which provided for the creation of a commission to be known as the loan commis-
175 sioners, and the funding by this commission of the outstanding and existing indebtedness of the Territory. This commission was to be composed of the governor, auditor and secretary of the Territory. Congress, by the act of June 25, 1890, amended the territorial act in important particulars and then "approved and confirmed" the same, "subject to future territorial legislation." The territorial legislature, construing the clause "subject to future territorial legislation" to mean that Congress, having taken up the territorial act of 1887 and amended it, before making it binding and operative upon the Territory, chose to confer upon the latter the privilege of consenting to, or disapproving of its provisions, by its act of March 19, 1891, supplemented the congressional act by additional provisions intended to more perfectly carry out its provisions, and in the first section declared that the latter act should "be and the same is hereby now re-enacted as of the date of its approval." The language used in the territorial act, indicates that the territorial legislature intended to approve of the congressional act and accept its provisions, under the permission granted and expressed in the clause, "subject to future territorial legislation." Whether this construction was primarily right or not, it has been subsequently followed by the Legislative Assembly of the Territory and acquiesced in by Congress. Congress, by the act of August 3, 1894, amended section 15 of the act of June 25, 1890, by extending its provisions so as to permit
176 the funding of additional indebtedness. When the next legislature convened after the passage of the congressional act just mentioned, construing, as it did its predecessor, the clause "subject to future territorial legislation" to mean that the congressional act should only become operative when accepted by the

Territory through its General Assembly, by act approved March 19, 1895, ratified and confirmed the objects, purposes and provisions of the congressional act. In the congressional act of August 3d, 1894, and in the curative act of Congress of June 5, 1896, the act of Congress of June 25, 1890, is referred to, and no mention is made of a re-enactment of the same by the territorial legislature, which is significant as indicating that Congress recognized the act of June 25, 1890, as having become operative and as continuing in force and as constituting the existing law upon the subject of funding. Congress having full authority to legislate directly for the Territory, and the territorial legislature having only such power as is specifically delegated to it by Congress, whenever the latter legislates upon any subject pertaining to the Territory, such legislation has the force and effect of a constitutional provision and becomes a part of the organic law. Had the clause, "subject to future territorial legislation" not appeared in the act of June 25, 1890, unquestionably the act would have become immediately operative without the consent or acquiescence of the Territory, and no subsequent legislation
177 by the territorial legislature would have been needed to give it effect or could in any way affect its provisions. In the light of the contemporaneous construction placed upon the clause "subject to future territorial legislation" by the legislature of the Territory, and in view of the fact that Congress thereafter invariably referred in subsequent legislation to the act of Congress of June 25th, 1890, and made no mention of any re-enactment of the same by the Territory, and considering the relation which the Territory sustains to Congress, we are led to the conclusion that the act of June 25, 1890, is now to be construed as having been accepted in accordance with the permission granted to accept or refuse the same, and having been accepted, is now the paramount law upon the subject of funding and become a part of the organic law, to the extent at any rate that it may not be changed so as to render any of its provisions inoperative by any act of the territorial legislature, except with the express consent of Congress.

The repealing statute which we have referred to, being act No. 32 of the Laws of 1899, reads as follows: "That paragraph 2039, section 1, chapter 1, title XXXI, of the Revised Statutes of the Territory of Arizona; also that section 1 of act No. 79, Session Laws of the 16th Legislative Assembly of the Territory of Arizona; also act No. 32 and act No. 74, Session Laws of the 18th Legislative Assembly of the Territory of Arizona are hereby re-
178 pealed." Paragraph 2039, referred to in this act, was reincorporated as the first section of the congressional act of June 25, 1890, and reads as follows: "For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona. The governor of the said Territory, together with the territorial auditor and the territorial secretary and their successors in office, shall constitute a board of commissioners to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the power and perform the duties hereinafter provided." Act No. 79 referred to, is the act

of March 19, 1891. Acts No. 33 and acts No. 74 sought to be repealed by the act, do not pertain to the creation of the board of loan commissioners, and their consideration is not important in this connection.

The act of Congress of June 25, 1890 covered the whole field of the previous territorial legislation upon the subject of funding, and included such new legislation as to clearly indicate the intent that it should take the place of the territorial act of 1887. When two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the former and embraces new provisions plainly showing that it is intended as a substitute for the first act, it will operate as a repeal of that act.

U. S. *vs.* Tynin, 11 Wall. 88.

The act of Congress being revisory in its terms, embracing
179 new provisions and covering the whole subject of funding, supplemented and thereby repealed the territorial statute of 1887. As repeals by implication are not favored, the repeal of the first section of the statute of 1887 can therefore have no effect to repeal the similar provision of the act of June 25, 1890.

Again, by the attempted repeal of the first section of the act of March 19, 1891, which, as we have seen, provided in terms "that the act of Congress entitled, 'An act approving, with amendments, the funding act of Arizona approved June 25, 1890,' be and the same is hereby now re-enacted as of the date of its approval." the intent of the legislation is uncertain in that it is not made evident whether the repeal of said section is to be construed as an attempt to repeal the whole or only a part of the congressional act, if it can possibly be construed as tending to either result. It can hardly be construed as an attempt to repeal the whole of the act of June 25, 1890, inasmuch as the other sections of the act of March 19th, 1891 were excepted from the repealing act and these were supplemental to the congressional act. If the repealing of section 1 of the law of 1891 be construed as a repeal of only a part of the act of June 25, 1890, how then can the court give it effect by declaring what portion of said act it was designed and intended to affect? Irrespective therefore, of the question of the power of the territorial
180 legislature to repeal the congressional act creating the loan commission, it is more than doubtful if the act of 1899 can be construed so as to effect that result.

Mr. Justice Brown, in the opinion delivered in this case in the Supreme Court, construing the act of Congress of June 6, 1896, said: "The first section of the act required the funding of all outstanding obligations of said Territory and its municipalities, and all outstanding bonds, &c., of the Territory and its municipalities, 'heretofore authorized by legislative enactment of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 5, 1890,' which said bonds, &c., 'have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized:' and the second section confirms, approves and validates all bonds and other evi-

dences of indebtedness theretofore issued under the authority of the legislature, and authorized to be funded by the first section, and declares that they may be funded as in this act provided, until January 1, 1897." As we have said, therefore, under the opinion of the Supreme Court and its mandate, as well as under the terms of the act of June 6, 1896, we are limited under the issues of fact raised by the amended return, to the inquiry as to whether the bonds in question "have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they
181 were authorized." The first two sections of the act of February 21, 1883, read as follows:

"SECTION 1. Upon information in writing to the chairman of the board of supervisors of Pima county, Arizona Territory, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of said Territory, on the 23rd day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said county of Pima, according to the provisions of this act, it shall be the duty of said chairman, and he is hereby directed to call a meeting of said board, to be held within five days after the receipt of said notification, and it shall be the duty of said board of supervisors, and they are hereby directed to meet within five days, at the county-seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said county, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds, and the interest coupons thereto attached shall be signed by said chairman and the clerk of said board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the clerk of said board to the county treasurer of said county of Pima, to be by him disposed of as hereinafter provided, and said county treasurer shall receipt to the said clerk for the said bonds."

182 "SEC. 2. Upon the application of said railroad company to the said treasurer, and the tender by said company of fifty thousand dollars of the first-mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said county, it shall be the duty of said treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the president and secretary of said railroad company, in exchange for fifty thousand dollars of the first-mortgage bonds of said railroad company, so tendered as above provided. And whenever, and so often as — five *each* miles of said railroad shall have been graded, laid with ties and iron, said treasurer shall upon proof thereof, which proof shall be the certificate of the county surveyor to that effect, exchange with the said president and secretary of said railroad company fifty thousand dollars of said bonds of said Pima county for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima county are exchanged for a like number of bonds of said railroad company."

It is to be noted that under the provisions of these sections of the statute, that the bonds of the county were to be exchanged for the bonds of the railroad company under the condition therein provided, and does not provide for a sale of the same. It is also to be noted that of the issue of two hundred thousand
183 dollars of the bonds of the county, called for by the act, fifty thousand dollars was to be exchanged upon the organization of the company, and upon notice to the county of the company's readiness to exchange a like amount of bonds, the county was to deliver to the company, bonds to the amount of fifty thousand dollars; that a like amount was to be delivered by the county treasurer to the company in exchange for a like amount of railroad bonds whenever the county surveyor should certify that five miles of the company's railroad had been graded and laid with ties and iron and thereafter, upon the completion of an additional five miles of said railroad as provided, the county treasurer, upon proof thereof by the certificate of the county surveyor to that effect, exchange a like amount of county bonds for the same amount of railroad bonds, until the full issue, two hundred thousand dollars of the county bonds, had been exchanged for a like amount of railroad bonds. Under the act, therefore, the question is narrowed to the inquiry as to whether each provision of the statute relating to the exchange of bonds was complied with by the railroad company on the one part, and the officers of the county on the other. The records of the board of supervisors of Pima county show that on the 26th day of April, 1883, W. H. Culver, president of the Arizona Narrow Gauge Railroad Company, addressed a letter to James H. Toole, chairman of the board of supervisors of Pima county, notifying the latter that the Ari-
184 zona Narrow Gauge Railroad Company was ready to exchange its bonds for the bonds of the county in accordance with the provisions of the act of February 21, 1883. On May 5, 1883, as it appears in the minutes of the board, an order was made that two hundred thousand dollars of bonds of the county be issued and be placed in the hands of the county treasurer upon the condition expressed that the Arizona Narrow Gauge Railroad Company execute a bond to the county in the sum of five hundred dollars, conditioned that if the county bonds were not exchanged in accordance with the provisions of the act of February 21, 1883, that the said railroad company would repay to said county, all expense incurred in the issuance of said bonds. A receipt was introduced in evidence dated August 3, 1883, and signed by one J. C. Elliott, then county treasurer, acknowledging the receipt from the clerk of the board of supervisors of the county, of two hundred bonds of the denomination of one thousand dollars each, to be issued to the Arizona Narrow Gauge Railroad Company as provided by law. It appears in evidence that the first exchange as provided by the act, of fifty thousand dollars county bonds for a like amount of railroad bonds, was made at some date during the year 1883. This is shown by the record in an action brought by a tax-payer of the county against the board of supervisors and the county treasurer in the district court of Pima county

during the latter part of the year 1883, to restrain the latter
185 from accepting the bonds of the Arizona Narrow Gauge Railroad Company in exchange for the bonds of the county. It is also shown that these fifty thousand dollars were delivered during the year 1883 to the railroad company by the county, by the minute entry of the board of supervisors, showing the action of the board taken with reference to an application filed June 16, 1884 by the railroad company, and an offer by the railroad company to return to the county, fifty thousand dollars of county bonds and accept in full payment therefor, county warrants of the face value of twenty-two thousand five hundred dollars. It appears from the evidence that prior to the year 1886, the railroad company had expended in the construction of the road, not to exceed twelve thousand dollars; that during that year the railroad company entered into a contract with one W. W. Walker, wherein the latter undertook to complete the road in accordance with the act of the legislature and original intent of the company; that under this contract, the county bonds held by the railroad company, were turned over to Walker. It further appears that Walker represented the firm of Coler & Company, bankers and brokers of New York city; that under the Walker contract, said Coler & Company transmitted to the Bank of Tucson for the building of the road, fifty-two thousand nine hundred, and forty one-hundredths dollars; that there was graded and laid with ties and rails, ten miles of road by Walker under his contract, and that thirty miles in all, were graded. It also appears that when the first five miles of
186 road had been built, the county treasurer turned over to Walker for Coler & Company, under their contract with the railroad company, fifty thousand dollars of county bonds in exchange for a like amount of railroad bonds, and that subsequently, upon the completion of the ten miles of road, a like exchange was made of an additional fifty thousand dollars. George J. Roskruge testified that in 1886 he was county surveyor of Pima county, and examined the railroad constructed by the Arizona Narrow Gauge Railroad Company; that he measured the road on two occasions and found upon the first, that there *was* five miles graded, laid with ties and rails, and upon the second, found that there *was* ten miles of road graded and laid with ties and rails, and gave his certificate to the county treasurer upon both occasions, in the language of the act of February 21, 1883, stating the facts as he found them.

It further appears that there was graded under the Walker contract, in the neighborhood of thirty miles of road, but only the first ten miles of the road were ever laid with ties and rails; that for various reasons, Walker or Coler & Company either were unable to, or chose not to, complete the road. The records of the board of supervisors show that in 1887 an agreement was entered into between the railroad company and Walker on the one part, and the board of supervisors and the county treasurer on the other part, whereby it was agreed that the county should sell to the railroad company and Walker, one
187 hundred and fifty thousand dollars of railroad bonds held by the county, to said railroad company for twenty-five cents

on the dollar, and to receive in payment the bonds of the county at par, and the railroad company and Walker agreed to build and put into operation, sixty miles of said road and secure the majority of the trade of the town of Globe for the city of Tucson. There were other provisions in the contract relating to the exchange of the remaining fifty thousand dollars of county bonds held by the treasurer, in exchange for a like amount of bonds of the railroad and the sale of the latter to the railroad company upon same terms as were provided in the contract for the bonds already exchanged. It further appears that this agreement was not complied with on the part of the railroad company or Walker, and that on July 23, 1890, the board of supervisors made an order and transmitted the same to the county treasurer, directing the latter to cancel the remaining fifty thousand dollars of county bonds held by him. It further appears from the evidence in the case, that nothing has ever been paid by the county in the way of interest upon bonds of the county delivered to the railroad company

Do these facts show that the bonds in question are included among those required by the act of Congress of June 6, 1896 to be funded? It must be conceded that the county of Pima derived little or no benefit from the building of the few miles of the Arizona Narrow Gauge railroad; however, there can be no
188 question under the proof, that the terms of the act of February 21,1883 were fully complied with, both on the part of the county and, as well, on the part of the railroad company in the matter of the issuance and exchange of the bonds to the extent that the legislative act specifically provided. There was nothing in evidence showing bad faith on the part of the railroad company in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company or its contractor, Walker and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the thirty miles of grading and laying of ten miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done and did not have the resources to go on and complete the work. Can the court say that notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue, the original holders of those bonds failed to complete the railroad and the county of Pima thereby received no benefit from the same. The question of a failure of consideration is to be distinguished from that of an exchange of bonds in good faith under the act of June 6, 1896, unless the failure of consideration was due to a failure on the part of
189 the holders of the bonds to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the

one which required a certificate of the county surveyor, showing that each five miles of the road was graded and laid with ties and iron, as a condition precedent to the exchange of each fifty thousand dollars of county bonds for a like amount of railroad bonds. As the Supreme Court has held in this case, Congress, by the act of June 6, 1896, has validated the territorial act of February 21, 1883. And as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial but a literal compliance, as well, with the requirements of the act under which they were issued. We are forced to the conclusion, therefore, that no facts have been shown under the amended return, which would warrant us in holding that the bonds in question were excluded from the provisions of the act of June 6, 1896, but on the contrary, find that it is our plain duty under the decision of the Supreme Court construing said congressional act, and mandatory upon us, to issue the writ of
190 mandate prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon under the provisions of the act of June 25, 1890.

RICHARD E. SLOAN,
Associate Justice.

We concur.

WEBSTER STREET,
Chief Justice.

FLETCHER M. DOAN,
Associate Justice.

GEO. R. DAVIS,
Associate Justice.

(Endorsed:) No. 546. James L. Utter, *et al.* pl'ffs *vs.* B. J. Franklin, *et al.* respondents. Opinion of court. Recorded Book 5, pages 48-60. Filed M'ch 22—1901. Thos. Grindell, clerk.

191 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners, *vs.* B. J. FRANKLIN ET AL., Defendants. } Motion for New Trial and Rehearing.

Come now defendants herein, and move the court to set aside its order and judgment rendered herein, and to grant defendants a new trial and rehearing of this action, and in support of this motion defendants allege:

1. That the court admitted improper evidence for plaintiffs over defendants' objections.
2. That the court refused to admit proper evidence for defendants.
3. That the order and judgment are against the law.
4. That the order and judgment are against the evidence.

5. That the order and judgment are against the law and the evidence.

6. That the order and judgment are on evidence insufficient in law.

7. That the evidence does not support the order and judgment.

8. That the court should have rendered its judgment for defendants.

192 9. That the court erred in refusing to dismiss this petition for want of jurisdiction.

10. That the court erred in holding that the loan commission of Arizona was still in existance.

Wherefore defendants move.

Phœnix, Arizona, March 22, 1901.

C. F. AINSWORTH,
Attorney General,
By ROCHESTER FORD.
ROCHESTER FORD,
Of Counsel for Defendants.

(Endorsed:) No. 546. Supreme court, Territory of Arizona. James L. Utter, *et al.* petitioners, *vs.* B. J. Franklin, *et al.* defendants. Motion for new trial and rehearing. Filed M'ch 22, 1901, Thos. Grindell, clerk.

193 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
B. J. FRANKLIN ET AL., Defendants. } No. 546.

Precept.

The Territory of Arizona to the sheriff of Pima county, Greeting:

Whereas, on an appeal in the above-entitled cause, by the appellant- herein, the supreme court of the Territory of Arizona, did on the 22nd day of March, 1901, render judgment in said cause for petitioners; and whereas the above-named defendants did, on the 22nd day of March, 1901, and within fifteen days after the rendition of said judgment by said supreme court, file in the office of the clerk of said court, *its* certain motion for rehearing of said cause, a duly certified copy of which motion accompanies this precept.

Now, therefore, you are hereby commanded that you deliver said certified copy of the said motion for rehearing to Messrs. Barnes & Martin attorneys of record for petitioners, whose residence and place of business is Tucson, Arizona, and that you make the return of this precept with your proceedings thereunder entered thereon to this court forthwith.

194 Witness, the Honorable Webster Street, chief justice of the supreme court of the Territory of Arizona, and the seal of said court.

[SEAL.]

Done at Phœnix, the capital of Arizona this 26th day of March, 1901.

THOMAS GRINDELL,
Clerk of the Supreme Court of Arizona.

OFFICE OF THE SHERIFF, }
Pima County. }

I hereby certify that I received precept on the 28th of March, 1901, and personally served the same on Messrs. Barnes and Martin on the 28th day of March, 1901.

Dated this 28th day of March, 1901.

FRANK E. MURPHY, *Sheriff*,
By E. DRACHMAN, *Deputy Sheriff*.

(Endorsed:) In the supreme court of the Territory of Arizona. No. 546 Jan. term, 1901. James L. Utter, *et al.*, petitioners *vs.* The Loan Commission, respondants. Precept. Filed M'ch 29, 1901. Thos. Grindell, clerk.

195 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, Petitioners,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Defendants.

No. 546. Findings of Fact.

The court finds and states the facts in the above-entitled case to be as follows:

I.

That the Arizona Narrow Gauge Railroad Company, mentioned in the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, which articles specified that the undersigned subscribed to the shares opposite their names to the capital stock of the corporation under the general railroad act of the Territory of February 14, 1879 for the purpose of constructing, owning and maintaining railroads; the line to begin at Tucson, Arizona, thence by the most favorable route
196 in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila river to San Carlos; thence in a northerly direction to the San Carlos river; thence northeasterly to Fort Apache; thence northeasterly to the 35th parallel, passing into and through the counties

of Pima, Pinal, Graham, Gila and Apache; signed by eleven persons, each subscribing two hundred shares of the value of $2,000, which articles are in words and figures as follows, to wit:

"We, the undersigned, residents of the Territory of Arizona, have subscribed and do hereby subscribe the number of shares and the sums representing the value thereof placed opposite our names hereunder to the capital stock of a corporation to be formed under the provisions of the general railroad incorporatien act of Arizona Territory, approved February fourteenth, 1879, for the purpose of constructing owning and maintaining railroads, between the termini and over the rout- described as follows:

"1. The line begins at Tucson, Pima county, Territory of Arizona, thence by the most favorable route in a northerly direction to a pass through the Tortilita mountains, thence in a northerly direction along the San Pedro river to its mouth; thence in a northeasterly direction along the Gila River valley to San Carlos; thence in a northerly direction to the San Carlos River valley, thence in
197 a northeasterly direction along the western slope of the White mountains to Fort Apache; thence in a northeasterly direction to the thirty-fifth (35th) parallel of north latitude, all of said line passing into and through the counties of Pima, Pinal, Graham, Gila and Apache of the Territory of Arizona, and the aggregate length of said road being about two hundred and ten miles.

Hugh Farley, 200 shares, value	$20,000.00
Wm. H. Culver, 200 shares, value	20,000.00
George Pusch, 200 shares, value	20,000.00
Jno. R. Culver, 200 shares, value	20,000.00
Joseph Goldtree, 200 shares, value	20,000.00
C. C. Stephens, 200 shares, value	20,000.00
L. C. Hughes, 200 shares, value	20,000.00
R. N. Leatherwood, 200 shares, value	20,000.00
P. R. Tully, 200 shares, value	20,000.00
J. C. Handy, 200 shares, value	20,000.00
C. P. Sykes, 200 shares, value	20,000.00

November 5th, A. D. 1882.

Stock to the amount of more than one thousand dollars for each and every mile of the above proposed railroad having been subscribed, we the subscribers thereto hereby appoint Hugh Farley and Wm. H. Culver, a committee of subscribers for the purpose of giving notice of a subscribers' meeting for the purpose of adopting articles of association as required by law, and for the further purpose of electing from said subscribers not less than five nor more than thirteen directors as required by law: Hugh Farley, Wm. H. Culver, George Pusch, J. P. Culver, Joseph Goldtree, C. C. Stephens, L. C. Hughes, R. N. Leatherwood, P. R. Tully, J. C. Handy, C. P. Sykes.

We hereby appoint the 21st day of November, A. D., 1882,
198 at ten o'clock a. m. at the office of Culver & Aram in Tucson,

Pima county, Arizona Territory as the time and place for the first subscribers' meeting.

HUGH FARLEY.
WM. H. CULVER.

We the undersigned subscribers as aforesaid admit the receipt of service of notice of said subscribers' meeting from said committee this 13th day of November, A. D. 1882.

C. P. SYKES,
J. GOLDTREE,
WM. H. CULVER,
L. C. HUGHES,
GEORGE PUSCH,
R. N. LEATHERWOOD,
HUGH FARLEY,
C. C. STEPHENS,
J. P. CULVER,
J. C. HANDY,
P. R. TULLY.

On this 21st day of November, A. D. 1882, at 10 o'clock a. m. at the office of Culver & Aram, in Tucson, Pima county, Arizona Territory, we the undersigned subscribers to the amount of two thousand and two hundred shares, amounting to the value of two hundred and twenty thousand dollars being an amount exceeding one thousand dollars per mile for each and every mile of the railroad herein and hereafter proposed having received seven days' notice as by law required from a committee of subscribers legally appointed do at this meeting adopt the following articles of association:

199

Article I.

The name of this incorporation shall be the Arizona Narrow Gauge Railroad Company.

Article II.

The number of years this incorporation shall continue in existence shall be fifty years.

Article III.

The amount of the capital stock of this corporation shall be three million dollars, which shall be divided into thirty thousand shares of one hundred dollars each, which sum is the actual contemplated cost of constructing the road herein proposed to be constructed together with the cost of the right of way, motive power and every other appurtenance and thing for the completion and running of said road as nearly as can be estimated by John P. Culver, of Tucson, Arizona Territory, a competent engineer whose estimate and report is annexed hereto and made a part hereof.

Article IV.

The number of directors to manage the affairs of the company shall be eleven and names of the first directors shall be Hugh Farley, Wm. H. Culver, George Pusch, J. P. Culver, Joseph Goldtree, C. C. Stephens, L. C. Hughes, R. N. Leatherwood, P. R. Tully, J. C. Handy & C. P. Sykes, who shall hold their office until others are elected as shall be provided by the by-laws of the company.

Article V.

The places from and to which the proposed road together
200 with the branches thereof, are to be constructed and the counties into and through which said road and branches are intended to pass and their length as near as may be are the same as set forth in the preceding statement of subscription — is made a part of these articles of association.

Hugh Farley, of Tucson, Arizona Ter. 200 shares value $2,000.00.
Wm. H. Culver, of Tucson, Arizona Ter. 200 shares value $2,000.00.
George Pusch, of Tucson, Arizona T'y 200 shares, value $20,000.00.
Jno. P. Culver of Tucson, Arizona T'y 200 shares value $20,000.00.
Joseph Goldtree of Tucson, Arizona T'y 200 shares value $20,000.00.
C. C. Stephens of Tucson, Arizona Ter. 200 shares value $20,000.00.
L. C. Hughes of Tucson, Arizona T'y 200 shares value $20,000.00.
R. N. Leatherwood of Tucson, Arizona T'y 200 shares value $20,000.00.
P. R. Tully of Tucson, Arizona T'y 200 shares value $20,000.00.
J. C. Handy of Tucson, Arizona T'y 200 shares value $20,000.00.
C. P. Sykes, Calabasas, A. T. 200 shares value $20,000.00.

Estimate of actual cost of constructing a railroad of three feet gauge along the line set forth in the foregoing articles of association, together with the cost of right of way, motive power, depots and stations, rolling stock, and other appurtenances and things for the completion and running of the road.

Estimate per Mile.

Right of way, station grounds and buildings	$300.00
Motive power	250.00
Cars of all kinds	210.00
Rails, fastenings and track-laying	6,300.00
Ties 2,640 per mile	1,300.00
201 Grading and bridgeing	5,100.00
Incidental and miscellaneous	400.00
Total cost per mile	$13,860.00
Total cost of 210 miles	2,910,600.00

I, John P. Culver, hereby certify that I am a civil engineer by occupation and profession that I have had examined the line of the road hereinbefore proposed and set forth and have estimated the actual contemplated cost of construction of said road together with the cost of right of way, motive power and every other appurtenance and thing for the *contemplation* and running of said road, and the actual contemplated cost as nearly as can be estimated is the sum of $2,910,600.

JNO. P. CULVER.

Filed in the office of the secretary of the Territory of Arizona, this 23rd day of November, A. D. 1882, at 3 o'clock p. m.

H. M. VAN ARMAN,
Secretary of Territory,
By F. S. INGALLS, *Ass't.*

202 II.

That the president of the Arizona Narrow Gauge Railroad Company mentioned in the act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," on April 27, 1883, gave information in writing to the chairman of the board of supervisors of Pima county, Territory of Arizona, that the said railroad company was ready to exchange bonds with the said county of Pima according to the provision of the said act approved February 21, 1883.

III.

That upon such information in writing being given to the chairman of the board of supervisors of Pima county, Territory of Arizona, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of the said Territory on the 23d day of November, 1882, that the said railroad company was ready to exchange bonds with the said county of Pima, according to the provisions of the said act approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," the said chairman of the said board of supervisors called a meeting of the said board to be held within five days after the receipt of the said notification, namely, to be held at the office of the said board at the court-house on Monday, the 30th day of April, 1883, at ten o'clock a. m.
203 to take action on said notice and application.

IV.

That the board of supervisors of the county of Pima, Territory of Arizona, met at their office in the court-house at the county-seat of said county on Monday April 30, 1883, at ten o'clock a. m. pursuant to the call by the chairman of the said board issued April 27, 1883, made as prescribed in section 1 of the act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," to consider the application of W. H. Culver, president of the Arizona Narrow Gauge Railroad Company, for an exchange of bonds in accordance with the provisions of the said act. That the said board adjourned from time to time until May 5, 1883, on which day the following proceedings were had, as appears by the minute entries of the said board: "The board resumed the consideration of the application of the Narrow Gauge Railroad Company for exchange of bonds. After argument for and against the proposition, Supervisor Toole offered the following: Ordered, that the board, having duly considered the ap-

plication of the Narrow Gauge Railroad Company for an exchange of $200,000 of bonds, and being of the opinion that the said railroad company is not in position to give any guarantee that they intend in good faith to build said road; it is ordered that until said company do some act in accordance with the provisions of the law under
204 which they ask an exchange of bonds, their application be refused and denied. The motion not being seconded was not entertained. Supervisor Samaniego presented for the consideration of the board the following order: "Ordered $200,000 of the bonds of the county of Pima drawn in accordance with an act of the Legislative Assembly of the Territory of Arizona, entitled 'An act to promote the construction of a certain railroad,' approved the 21st day of February, A. D. 1883, be issued and that the same be placed in the hands of the county treasurer upon the Narrow Gauge Railroad Company giving bonds to the county of Pima in the sum of five hundred dollars, conditioned that if the above bonds are not exchanged in accordance with the provisions of said act for the bonds of the above-named railroad, that said company will repay the said county of Pima all expenses incurred in the issuance of said bonds; the bond to be approved by the board after submission to the district attorney as to form. The question being upon the adoption of the order, those voting — the affirmative were Supervisors Otis and Samaniego, those voting — the negative Supervisor Toole. So the motion passed and was adopted." That on May 19, 1883, the said board of supervisors of the county of Pima ordered that the clerk be instructed to prepare forms of bonds to be ready for the inspection of the board on May 21, 1883. That on May 21, 1883, the records of the board of supervisors of said county show that the clerk submitted forms of such bonds and
205 that the said board ordered them to be lithographed. That on August 2, 1883, the said board made the following order, to wit: "In the matter of exchange of bonds with the Arizona Narrow Gauge Railroad Company; ordered that the respective county officers required by law so to do, sign and seal said bonds, and thereupon the clerk of the board is especially instructed to deliver said bonds to the county treasurer, taking his receipt therefor." That there was filed with the clerk of said board August 3, 1883, over the signature of W. J. Osborne clerk, and signed J. C. McElliot, county treasurer, the following: "Tucson, A. T., August 18, 1883. Received of William J. Osborne, clerk of the board of supervisors of the county of Pima, two hundred (200) bonds of one thousand (1,000) dollars each, numbered from one to two hundred inclusive of the county of Pima, for issue to the Narrow Gauge Railroad Company of Arizona, as provided by law." That said bonds and coupons embraced bonds numbers one to one hundred and fifty inclusive, and the coupons thereon described in the petition in these mandamus proceedings. That on June 16, 1884, there was entered in the minutes of the said board of supervisors of Pima county, the following: Ordered that the chairman of the board be authorized when he shall deem it expedient, to institute proceedings for the recovery of the county bonds issued to the

Arizona Narrow Gauge Railroad Company and to stop the payment of the interest thereon. That on said June 16, 1884, there
206 was filed in the office of the clerk of the board of supervisors of said Pima county, Arizona, a paper signed William C. Davis, president of the A. & G. R. R. Co., and attested C. C. Stevens secretary, and addressed to the board of supervisors of said county as follows: "The A. & G. R. R. Co. by its president, W. C. Davis, hereby offers for reasons that are obvious and well understood by your honorable board, to the supervisors of Pima county, $50,000 of Pima County bonds now held by said corporation and accept in full payment therefor, Pima County warrants of the face value to the amount of $22,500 and the corporation bonds heretofore exchanged for said county bonds. This sum of $22,500 is about $1,000 less than the actual *bona fide* expenses of the said corporation in the construction of the said road to date." That there was filed on the same day with the said clerk and signed by the same man as president of the said railroad company, and addressed to the board of supervisors of Pima county, a paper to the effect that the said railroad company "hereby offers to release the county of Pima from all obligations to said Arizona Narrow Gauge Railroad Company under an act of the legislature of Arizona, approved February 21, 1883. The said railroad company hereby offers and proposes to return to the supervisors of the said county of Pima $50,000 in bonds of said county issued to said company by said supervisors under said act, and release said county from the transfer of their bonds with the said
207 company under and by virtue of the above-mentioned act. The reasons of the proposed release of the said county are inability of the said company to dispose of said bonds in the amount of $50,000 advantageously and to the benefit of the said company, greater than the consideration hereinafter mentioned, as a consideration asked from the said county of Pima for the above-mentioned release and retransfer of the said bonds of the said county. The said company proposes and offers to release the said county as aforesaid and retransfer to the said county the $50,000 in bonds of said county upon the said board of supervisors returning to the said company the $50,000 of bonds of said company now held by the said board of supervisors, and the further consideration of the issuance to the said railroad company by the board of supervisors of warrants of the said county of Pima in the amount of $18,500." That on November 7, 1884, the following minute entry appears in the proceedings of the said board of supervisors: "Ordered, all members voting 'Aye,' that the county treasurer be instructed not to pay any interest on the bonds issued by the county to the Arizona Narrow Gauge Railroad Company until he receive the further order of the board, and that the clerk transmit a copy of this order to the treasurer."

208 V.

That there is no evidence in the records of the board of supervisors or the office of the treasurer of said Pima county how the first $50,000

of bonds came into the possession of the Arizona Narrow Gauge Railroad Company. That the incorporators of the said railroad company had no way in which they could reasonably count on having this road built; that they had no funds promised or secured with which to complete the road at the time and no arrangement with any capitalists or syndicate by which the money was to be furnished to complete the road; that they did not expect to put in the money themselves and had no idea where they were to get it. That the company in 1883 had graded about five and a half or six miles and had purchased ties and timber for bridges, but had no rails on the part graded. That the company suspended work in 1883 and that work was not resumed till about August, 1886. That the company had made an offer to sell the first $50,000 of bonds of Pima county, and almost everybody in the company tried to sell them. That the treasurer of the company was one B. M. Jacobs, a banker in the city of Tucson, Arizona, and that he had tried through the usual channels to place the bonds in New York, San Francisco and other places, and could not find any purchasers. That the company sent an attorney East to negotiate the bonds, but he was not able to do so; that the treasurer of the railroad company made several applications to the treasurer of Pima county to pay the interest on these
209 bonds but he refused to pay any interest, and the railroad company never received any money from the county treasurer or from anybody else on these bonds. That there were past-due coupons on the bonds of Pima county in 1886 when the first $50,000 of bonds were turned over to one W. W. Walker, who was an agent of Coler & Co., and that no interest had been paid on the bonds.

VI.

That afterwards, to wit, on or about August 13, 1886, the treasurer of the said county of Pima upon proof of the fact that five miles of said railroad mentioned in the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," had been graded, laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the said president and with the said secretary of the said Arizona Narrow Gauge Railroad Company $50,000 of said bonds of the said county of Pima, for $50,000 of the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said bonds of the county of Pima being numbers 51 to 100 inclusive, and being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter of fact that at the time the said $50,000 of said Pima County bonds were thus delivered by the treasurer of said county, at least five miles of the said Arizona Narrow Gauge railroad
210 had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883.

VII.

That afterwards, to wit, on or about August —, 1886, the treasurer of the county of Pima upon proof of the fact that a second and ad-

ditional five miles of the said Arizona Narrow Gauge railroad had been graded and laid with ties and iron, which proof was the certificate of the county surveyor to that effect, exchanged with the president and secretary of the said Arizona Narrow Gauge Railroad Company $50,000 bonds of the county of Pima, numbers 101 to 150 inclusive, for $50,000 of the first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company, the said $50,000 bonds of the county of Pima being part of the bonds described in the petition in these mandamus proceedings. It is further found as a matter of fact that at the time the said third $50,000 of said Pima County bonds were thus delivered by the treasurer of said county, at least ten miles of the said Arizona Narrow Gauge Railroad had been graded, laid with ties and iron and constructed as required by the said act approved February 21, 1883. It is further found as a matter of fact that no more than ten or ten and one-half miles of the said road have ever been laid with ties and iron, and that no work was ever done on the said road except to lay ten miles with ties and iron as above stated and grade about twenty miles additional. It is also further
211 found as a matter of fact that no passenger or freight trains were ever run over said road, and that after the delivery of the third $50,000 of said Pima County bonds, all work and operations on said road were abandoned and never resumed. That the ten miles out of Tucson which were laid with ties and iron were ballasted except for a very little bit of the way. That the road was not very well graded and was not a well-made road. The earth was thrown up loose. It was a light sandy loam and did not hold. There was a certain grade for two or three hundred feet, and then there would be another grade and then at the end of that another grade.

VIII.

That the original stockholders of the road were not able to continue work on it after the grading done in 1883 and suspended all operations after that time. That in March, 1886, these original stockholders turned over all the assets of the road to one W. W. Walker, on his agreement to complete the road in accordance with the said act of the legislature of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad," and in accordance with the original intent of the company; that said W. W. Walker and his associates, Coler & Co., who were a firm of bankers and brokers of New York city, took the stock of said Arizona Narrow Gauge railroad and elected a new board of directors and new officers; that said W. W. Walker did
212 not have sufficient means to build thirty miles of the said railroad and that Coler & Co. knew this fact; that said Walker was the representative and agent of said Coler & Co.; that Coler & Co. became stockholders of the Arizona Narrow Gauge Railroad Company on August 9, 1886, receiving one-third of the stock; that all the money for the building of the said ten miles and the grading of the twenty miles additional, amounting to $52,900.42,

was transmitted by Coler & Co. to the Bank of Tucson for the credit of W. W. Walker, agent, and was all expended under the supervision and orders of one C. S. Coler, who was a nephew of W. N. Coler, and who was sent from the East to represent said W. N. Coler and to act as cashier and to sign all checks for all funds paid out in the construction of the said road. That said Coler & Co. made a contract with W. W. Walker in which Coler & Co. agreed to finance and build the first thirty miles of the said road and to pay over moneys as needed for construction expenses, but that after Coler & Co. had received $150,000 of Pima County bonds, being the 150 bonds involved in these mandamus proceedings, said Coler & Co. refused to proceed further on the lines originally agreed upon. That the said second and third $50,000 of said Pima County bonds were received from the county treasurer of Pima county by W. H. Culver, who was the president, and Charles E. Walker who was the secretary, of said Arizona Narrow Gauge Railroad Company, and were by said Charles E. Walker packed, sealed and
213 delivered to the express company for shipment to Coler & Co. in New York, and that the first installment of $50,000 Pima County bonds had been sent to Coler and Co. before May 18, 1886. That Coler & Co. agreed to pay for these bonds the price of 74¼ cents on the dollar and to pay the money over as needed for construction expenses, but Coler & Co. never rendered any account showing the amount of money advanced by them and for what purposes. That before Coler & Co. advanced any moneys in the work done on the ten miles which were laid with ties and iron and the twenty miles which were graded, W. N. Coler came to Tucson in person and investigated the condition of affairs and also sent an agent, one J. Alden Gaylord, who in February or March, 1886, went to Globe, Arizona, over the route of the proposed road in order to examine into the feasibility of it and whether it would pay and that said Gaylord on May 11, 1886, wrote to W. N. Coler & Co. that "in accordance with your instructions" he had made a trip to Arizona in March and examined into the "particulars of the issues of $200,000 of bonds to the Arizona Narrow Gauge Railroad Company," and on March 27, 1886, addressed to the chairman of the board of supervisors of Pima county, the following letter:

"NEW YORK, *March* 27, 1886.

Hon. J. S. Mansfield, Tucson, chairman board of supervisors, Pima county, Arizona Territory.

MY DEAR SIR: This morning I wired you as follows: 'My
214 report has been favorably considered. Negotiations just closed. Building of your railroad is now a fixed fact. I congratulate you,' all of which I hereby confirm. It gave me equally as much pleasure to send the above as I know it did you to receive it. I have great faith in the almost unbounded resources of your country, and the narrow-gauge R. R. will be an important factor in developing them. It will in due course bring increased wealth, commerce and population to Tucson and Pima county, if your citizens do their part in encouraging these great commercial blessings,

and of that I do not have the slighest doubt. My friends have ample means to build the road up to the 'thirty-mile post,' and it is safe for me to say that the work will be pushed vigorously, and the R. R. will be finished there during the summer. Beyond that point (thirtieth mile post) you can readily understand that the extentions of it northwards to the mouth of the San Pedro (and still better to catch the immense carrying trade of Globe City) will depend very largely on the liberality and wisdom of the people of Pinal and Gila counties to grant aid, and see the necessity of doing so promptly, which I feel assured they will do nobly when the proper time arrives. With this object in view, I trust you and the members of the board of supervisors will do all in your poser officially and as good citizens to promote and prepare the way for this most important action, which is not only so vitally momentous for the future prosperity of Pinal and Gila, but your own county as well.

215 Possibly I may be offered a directorship in the narrow gauge by my friends who are building it, and in that event I may be out and visit your hospitable city this winter coming, or before, and I feel that it almost goes without saying that you will do all you consistently can to assist me in this matter.

In conclusion, I desire to thank you, the board, and all the citizens of Tucson and Pima for your kindness so cordially extended to me, by one and all, during my recent sojourn, and to assure you that I appreciated it most sincerely, and will never lose an opportunity to tell the truth here in the East (where so much misapprehension seems to exist), about the great resources of your country, as well as the courtesy, honesty and enterprise of its citizens.

With great respect, I have the honor to be, yours

Very truly, J. ALDEN GAYLORD."

IX.

That before the second and third delivery of $50,000 each of bonds of Pima county was made to the contractor, Coler & Co. were stockholders of the said Arizona Narrow Gauge Railroad Company and were holding and owning one-third of the stock of said railroad company, and at the time of the delivery of said $100,000 of said bonds the said contractor, one William W. Walker, who was engaged in constructing the said railroad, was the agent of William

216 N. Coler Sr., who was trading in the name of W. N. Coler & Co. That before the said W. N. Coler & Co. acquired the said bonds, they made inquiries of many persons, business men, officials, and others in Arizona recommending the said bonds, and the said W. N. Coler & Co. were informed in said letters that a road from Tucson to Globe would be a paying enterprise and that if said road were built it would in all probability be a paying investment. And said W. N. Coler & Co. before the bonds were delivered to them or any moneys had been advanced by them for construction work on the said railroad, were fully informed as to all the facts connected with the issuance of the first $50,000 of bonds, and that the county of Pima had refused to pay interest on same and that the original stockholders of the said Arizona Narrow Gauge Railroad Company

were unable to sell the $50,000 of bonds then in the possession of the treasurer of said Arizona Narrow Gauge Railroad Company and that the said company had abandoned the idea of doing any more work on the said railroad.—That after the said bonds were delivered to W. N. Coler & Co. he sold the same to various parties at prices ranging from 94 cents on the dollar, to par. That one John Green, holder of one of said bonds, Theodore Hill, holder of one of said bonds, Eva May Smith, holder of one of said bonds, Steven Tompkins holder of one of said bonds, and Emma L. Zabriskie, holder of four of said bonds have testified in this case that they bought the same without any knowledge of any defect and that they paid par for said bonds; that as the coupons came due on all
217 of the said $150,000 of bonds and after Pima county had refused to pay any interest on any of said bonds, Coler & Co. advanced to the holders of the coupons on all of said bonds the amount of said coupons as they became due and retained and kept the said coupons and all of them, and that this was continued to the year 1896 and that all of the said coupons sought to be funded in this case are owned by the firm of Coler & Co. That the coupon falling due July 1, 1887, on the said bonds of Pima county, was sent by Coler & Co. to the treasurer of Pima county for collection, and that the coupons falling due on said date from a number of these bonds were protested July 25, 1887, and the coupons falling due January 1, 1888, were also protested, and that Coler & Co. continued after the protest of said coupons to advance to the holders of the said bonds the amount of all the other coupons as they fell due semi-annually, all of which said coupons were retained and kept by Coler & Co. and are now the property of said firm. That prior to January 1, 1887, the firm of W. N. Coler & Co. was composed of W. N. Coler; that after January 1, 1887, and up to November 1, 1898, it was composed of W. N. Coler, Sr., and W. N. Coler, Jr., and that after November 1, 1898, Mr. Frank W. Coler became a member of the firm. That the said firm of W. N. Coler & Co. are now the owners and holders of thirty of the said Arizona Narrow Gauge Railroad bonds, numbers 101 to 130 inclusive, and that the
218 same were bought from the executors of one Elizabeth B. Voorhees under the following agreement:

"April 11, 1899.—Sold to W. N. Coler & Co. at private sale thirty, seven per cent. bonds, par $1,000 each known as the Arizona Narrow Gauge bonds, being numbers 101 to 130 inclusive, issued by Pima county, Arizona, July 1883, and repudiated by the county shortly after their issue. They have been the subject of litigation for several years which is still pending. Also five 6 % par value $1,000 each, issued by the city of Langton, Elk county, Kansas, being numbers 1 to 5 inclusive, for all of which we receive $11,000. Note: The Arizona Narrow Gauge Railroad bonds were in the possession of Coler & Co., who claimed a lien upon them for *pro rata* shares of moneys advanced by them and expenses incurred in carrying on the litigation to establish their validity together with other bonds of the same issue. Her *pro rata* share amounted to $14,000.

The Pima County bonds were in the actual custody of Coler & Co. April 11, 1899, the date of their sale as heretofore stated in Schedule A. Coler & Co. claimed a lien upon them which amounted to $14,000 or more for expenses of litigation in Arizona and elsewhere,"

which agreement was signed and sworn to by the executors of the said Elizabeth B. Voorhees; that the said firm of W. N. Coler & Co. is also the holder and owner of seven more of the said bonds issued by Pima county; that W. N. Coler, Jr., is the holder and owner of sixteen of the said bonds of Pima county, and that when he purchased them
219 he knew that the suit of Charles Edward Lewis *vs.* Pima County had been decided by the Supreme Court of the United States, and that at the time of the purchase of the said sixteen bonds by William N. Coler Jr. there was no market for them owing to the fact that they had been declared invalid in the said suit of Lewis *vs.* Pima County. That the North American Loan & Trust Company is the holder and owner of five of said bonds of Pima county, which they acquired by an exchange of other bonds on April 1, 1896; that at such date one Leonard H. Hole, an attorney of law, was the president of said North American Loan & Trust Company and that said Hole knew of the result of the suit of Charles Edward Lewis against Pima County shortly after the decision was rendered in said case in 1894, and that on or about April 1, 1896, said Hole knew by report that work had been stopped on the Arizona Narrow Gauge railroad; that James L. Utter, one of the petitioners herein, is engaged in the business of buying and selling municipal bonds and that he bought certain of these Pima County bonds from Coler & Co. and sold the same to other parties, and that the customers to whom said Utter sold the bonds delivered the coupons to Utter as said coupons fell due, and Utter paid the money on said coupons, and sent said coupons to Coler & Co., and received from Coler & Co. the money on all of said coupons down to about 1895, or 1896.

220 X.

That some of the purchasers of the said bonds from W. N. Coler & Co. sold and disposed of the same to other persons and that some time after the passage of the act of Congress of June 6, 1896, the persons who then held all the said $150,000 bonds and coupons pertaining thereto, including among others, Elizabeth B. Voorhees, one of the petitioners in these proceedings, who owned subject to the lien of Coler & Co. thirty of the said Pima County bonds, numbers 101 to 130 both inclusive, and James L. Utter, who owned absolutely in his own right four of said bonds, numbers 3, 11, 66 and 40, placed all these 150 bonds and the coupons pertaining thereto in the possession of the firm of W. N. Coler & Co., accompanied by the following written authority, signed by said persons, to wit:

"Messrs. W. N. Coler & Co., New York city.

GENTLEMEN: We herewith enclose you bonds number — amounting to $— wi*ll* full authority to deal with them in the same manner

as all other bonds of said issue placed in your hands, and with authority to change the form of said indebtedness in such manner as you deem to the best interests of all bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportional share of any and all expenses incurred by you in connection with this matter, it being
221 understood however that nothing in this shall be construed as an obligation on our part to assume any expense whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

Yours truly,"

That all the moneys expended in the litigation in Arizona over the coupons of said bonds and the other expenses in connection with efforts to validate these bonds have been advanced solely by Coler & Co. and that the other owners of the bonds never brought any suit on the coupons and never joined in defraying the expenses of any suit.

The persons who were at that time the owners of the said bonds and who thus delivered their bonds to W. N. Coler & Co. who in turn delivered them to James L. Utter and Elizabeth B. Voorhees and their attorneys, to be presented by them for refunding, were as follows, to wit:—

222

Albert Brown,	bond	No.	1 and 5.....	$2,000.00
B. V. Tompkins,	"	"	2 and 138.....	2,000.00
J. L. Utter,	"	"	3, 11, 37, 40, 65, 66, 67, 68, 92, 131, 132,	11,000.00
Jasper Westervelt,	"	"	4.....	1,000.00
Theodore Hill,	"	"	6.....	1,000.00
Steve Tompkins,	"	"	7.....	1,000.00
John Morehouse,	"	"	8, 9, 12, 13, 14.....	5,000.00
T. E. Packer,	"	"	10, 18, 19, 21, 63, 82, 94..	7,000.00
Orlin Champlin,	"	"	15.....	1,000.00
L. O. E. Noyes,	"	"	16.....	1,000.00
L. B. Seaver,	"	"	17, 51, 52, 96.....	4,000.00
George Parker,	"	"	20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36—	16,000.00
Est. Grace C. Brown,	"	"	38, 53, 54, 55, 56, 57.....	6,000.00
A. R. Duryee,	"	"	39.....	1,000.00
Esther Graham,	"	"	46.....	1,000.00
E. L. Zabriskie,	"	"	47, 48, 49, 50.....	4,000.00
M. L. Brown,	"	"	58, 59, 60, 61, 62.....	5,000.00
John Green,	"	"	64.....	1,000.00
E. P. Atwood,	"	"	69, 70, 71, 72, 73.....	5,000.00
W. N. Coler, Jr.,	"	"	74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90—	16,000.00
J. S. Heath,	"	"	91.....	1,000.00

J. J. Thomas,	bond No. 93.....		$1,000.00
Dime Savings Bank, Norwich, Conn.,	"	" 95.....	1,000.00
Leonard Smith,	"	" 97.....	1,000.00
J. Rishmore,	"	" 98.....	1,000.00
Hanry Chapel,	"	" 99.....	1,000.00
C. F. Spaulding,	"	" 100.....	1,000.00
E. B. Voorhees,	"	" 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130,	30,000.00
North American Loan & Trust Company,	Nos. 133, 134, 135, 136, 137...		5,000.00
W. N. Coler & Co.,	"	" 139, 140, 141, 142, 143, 144, and 145,	7,000.00
A. L. Bosworth,	"	" 146, 147, 148, 149, 150...	5,000.00
J. L. Austen,	"	" 41, 42, 42, 44, 45.....	5,000.00
			$150,000.00

223 That bonds 139, 145 inclusive now held by Coler & Co. were acquired by that firm prior to June 6, 1896, at a time when said bonds had no market value, and it is further found that except Elizabeth B. Voorhees, the other owners of these bonds have never been charged with any moneys advanced by Coler & Co. in regard to such bonds or expenses incurred by Coler & Co. in carrying on any litigation.

That W. N. Coler & Co. acting under and pursuant to the said authority transferred and delivered all the said bonds and coupons to James L. Utter and Elizabeth B. Voorhees, and to their attorneys Leonard H. Hole and Barnes & Martin, in order that the said bonds and coupons might be presented to the board of supervisors of the county of Pima, and to the board of loan commissioners of the Territory of Arizona, for refunding under the provisions of the act of Congress of June 6, 1896. That it was the express understanding that when the said bonds were refunded the new refunding bonds should be delivered to the several holders of the old bonds and coupons *pro rata*, and that the holders of the old bonds and coupons should bear *pro rata* the charges and expenses of such presentation, but that Coler & Co. have advanced all the moneys for expenses connected with all the litigation over these bonds and the holders and owners of the old bonds are not to assume any expense in case the said bonds are not refunded. It was also the express understanding and agreement that the said James L. Utter and Elizabeth B. Voorhees and their attorneys
224 had full authority to bring any suit or suits or mandamus proceedings which might be necessary in order to enforce the refunding of said bonds. The said James L. Utter and Elizabeth B. Voorhees expressly assented to this understanding and agreement

and trust as to all the bonds and coupons. Pursuant to the said understanding and agreement and trust as to all said bonds, all the said bonds and coupons were forwarded by express to Leonard H. Hole, attorney for said James L. Utter and Elizabeth B. Voorhess, and were by him received and taken to Arizona, and he, together with Barnes & Martin, attorneys-at-law in Arizona, presented said bonds and coupons to the board of supervisors of the county of Pima, and made a demand in writing on the said board of supervisors of said county that they report to the loan commission of the Territory of Arizona the said outstanding bonds and coupons and the indebtedness represented thereby, and that on the said board of supervisors failing to comply with their demands the said Leonard H. Hole and said Barnes & Martin presented the said bonds and coupons to the loan commissioners of the Territory of Arizona and made the demand upon them dated Phœnix, Arizona, December 14, 1896, which is set forth as Exhibit A to the petition in the pleadings in these mandamus proceedings, and on the refusal of the said loan commissioners to issue refunding bonds as demanded, the present mandamus proceedings were, pursuant to said understanding, and agreement, begun and instituted in this court on the
225 31st day of December, 1896. That the said bonds and coupons on which these mandamus proceedings are brought, are as follows, to wit: (Form of bond, serial number omitted)

One thousand dollars. UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.* $1,000.00.

The County of Pima, in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company or bearer at the office of the treasurer of said county, in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three (1903) the sum of one thousand dollars, in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum. Said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January and first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima under and by virtue of an act of the legislature of Arizona, entitled An act to promote the construction of a certain railroad, passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February, A. D. 1883; and this bond is one of a series of two hundred issued in pursuance of said act, and exchanged for a like number of bonds
225½ of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In witness whereof the said county, by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder

of the county of Pima; and the said clerk has affixed hereto the seal of the said county; and the said recorder has affixed hereto the seal of the said county recorder's office this first day of July, A. D. 1883.

JAMES H. TOOLE,
Chairman Board of Supervisors.
WILLIAM J. OSBORNE,
Clerk Board of Supervisors.
CHAS. R. DRAKE,
County Recorder.

That petitioners own and hold one hundred and fifty of said bonds, numbered from 1 to 150 both inclusive.

That there are at present attached to each of said 150 bonds seven interest coupons not yet due, numbered 34, 35, 36, 37, 38, 39, & 40, each for the sum of $35.00 and to become due as follows, to wit:

Coupon No. 34, July 1st, 1900.
Coupon " 35 January 1st, 1901.
Coupon " 36 July 1st, 1901
Coupon " 37 January 1st, 1902
Coupon " 38 July 1st, 1902
Coupon " 39 January 1st, 1903
Coupon " 40 July 1st, 1903.

That the form of each of said coupons, except as to number
226 of bond, number of coupon, and date of maturity, is as follows, to wit:

Pima County Bond.

Coupon number —.

On the 1st day of ——, A. D. 1—, the County of Pima in the Territory of Arizona, will pay to the bearer, at the county treasurer's office, at Tucson, thirty-five dollars ($35.00) being interest due on bond numbered —.

JAMES H. TOOLE,
Chairman Board of Supervisors of Pima County.
WILLIAM J. OSBORN,
Clerk Board of Supervisors of Pima County.
CHAS. R. DRAKE,
Recorder of Pima County.

That petitioners also own and hold three thousand eight hundred and ninety-one (3,891) like coupons, each for the sum of $35.00 clipped from said 150 bonds, and being coupons numbered 8 to 33, both inclusive from each of said 150 bonds, and due respectively:

Coupon No. 8 July 1st, 1887.
Coupon " 9 January 1st, 1888.
Coupon " 10 July 1st, 1888.
Coupon " 11 January 1st, 1889.
Coupon " 12 July 1st, 1889.

Coupon " 13 January 1st, 1890.
Coupon " 14 July 1st, 1890.
Coupon " 15 January 1st, 1891.
Coupon " 16 July 1st, 1891.
Coupon " 17 January 1st, 1892.
Coupon " 18 July 1st, 1892.
Coupon " 19 January 1st, 1893.
Coupon " 20 July 1st, 1893.
Coupon " 21 January 1st, 1894.
Coupon No. 22 July 1st, 1894.
227 Coupon " 23 January 1st, 1895.
Coupon " 24 July 1st, 1895.
Coupon No. 25 January 1st, 1896.
Coupon " 26 July 1st, 1896.
Coupon " 27 January 1st, 1897.
Coupon " 28 July 1st, 1897.
Coupon " 29 January 1st, 1898.
Coupon " 30 July 1st, 1898.
Coupon " 31 January 1st, 1899.
Coupon " 32 July 1st, 1899.
Coupon " 33 January 1st, 1900.

Except the following coupons, which are not produced by petitioners, to wit:

Coupons No. 14 from bonds Nos. 84, 85, 86, 88 and 90 due July 1, 1890.
Coupon No. 15 from bond No. 17, due January 1, 1891.
Coupon No. 22 from bond No. 93, due July 1, 1894.
Coupon No. 24 from bond No. 19, due July 1, 1895.
Coupon No. 25 from bond No. 19, due January 1, 1896.

228 XI.

That after the contract entered into with W. W. Walker and the transfer by the original stockholders of the Arizona Narrow Gauge Railroad Company of all the assets of the company including the first $50,000 of bonds of Pima county, there was no money in the treasury of the said Arizona Narrow Gauge Railroad Company, and the moneys for the work done on the said ten miles after the contract with said W. W. Walker as agent of Coler & Co. were not disbursed by the treasurer of the Arizona Narrow Gauge Railroad Company, but were all paid out by C. S. Coler as the representative and disbursing agent of W. N. Coler & Co. That the said Arizona Narrow Gauge Railroad Company never paid any interest on the bonds of said railroad company held by Pima county, and that the said Arizona Narrow Gauge Railroad Company never had any money with which to pay such interest and that all the said bonds of said railroad company held by Pima county were at all times and now are worthless. That for one year after 1886 taxes were paid on the property of the Arizona Narrow Gauge Railroad Company by W. N. Coler & Co., but that no taxes were paid after that time, and that W. N. Coler & Co. were notified that the taxes were unpaid and were notified of everything going on in Tucson.

229 XII.

That the said first-mortgage bonds of the said Arizona Narrow Gauge Railroad Company which were exchanged for the $150,000 bonds of Pima county were duly made and executed by the said company, were secured by deed of trust or mortgage to at least two trustees of all the property, real and personal, owned by said railroad at the time of the issuance of said bonds, or might thereafter be acquired, including also all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage was the first made of or on said property, and said bonds of said company were issued in the name of said company, and were made payable to bearer twenty years after date, and have interest coupons thereunto attached, and were made payable both principal and interest at the office of said company in the city of Tucson, in the county of Pima, and said deed of trust or mortgage provided that no more bonds than to the amount of $13,000 per mile to be secured by said deed of trust or mortgage should be issued by said railroad company, and the said first-mortgage bonds of said railroad company were likewise in all other respects made, issued and delivered in full conformity to all the provisions of the said act of the legislature of the Territory of Arizona approved February 21, 1883, entitled "An act to promote the construction of a certain railroad."

March 22, 1901.

WEBSTER STREET,
Chief Justice.

230 RICHARD E. SLOAN,
Asso. Justice.

FLETCHER M. DOAN,
Asso. Justice.

GEO. R. DAVIS,
Asso. Justice.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* B. J. Franklin, *et al.* Findings of fact. Filed April 2nd, 1901. Thomas Grindell, clerk. By Angie B. Parker, deputy.

231 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Plaintiff-,
vs.
B. J. FRANKLIN ET AL., Defendants. } No. 546.

Motion for a Rehearing.

Come now defendants and move the court to grant a rehearing of this cause, and in support of such motion represent—

1. That the decision herein is in conflict with the previous decisions of this court in the cases of Schuerman *et al.*, *v.* Territory 60 Pac., 895, and Gage *v.* McCord, 59 Pac., 99.

2. That the decision is in conflict with the decisions of the Supreme

Court of the United States in the case of Miners' Bank *v.* Dubuque, 12 How., 107, and of the various courts following such decision.

3. That the decision herein holding that the funding law of Arizona as set out in the Revised Statutes of 1887, is superseded by the congressional act of June 25, 1890, so far as the court holds that the loan commissioners did not continue under the authority of the Arizona legislature, is in conflict with the decisions of the Supreme Court of the United States in Wood *v.* U. S., 16 Pet., 363; Pac. Mail S. S. Co., *v.* Joliffe, 2 Wall., 450; Chicago Milwaukee & St. Paul
232 R'y Co., *v.* U. S., 127 U. S., 406; Bear Lake Co. *v.* Garland, 164 U. S., 12 and Utter *v.* Franklin, 171 U. S., 416.

4. That the decision herein is in conflict with the provisions of the act of the Twelfth Legislative Assembly of the Territory of Arizona, approved February 21, 1883, entitled "An act to promote the construction of a certain railroad."

5. Because the court did not grant defendants an opportunity to be heard orally in this case, and because the importance of the question involved is worthy of an oral presentation.

ROCHESTER FORD,
Of Counsel for Defendants.

Service of copy of foregoing motion is hereby acknowledged and service of any other copy by the clerk of the supreme court of Arizona or the sheriff of Pima county, is waived.

BARNES & MARTIN,
Attorney for Plaintiffs.

Dated, Tucson, Arizona, April 3, 1900.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.*, plaintiffs, *vs.* B. J. Franklin *et al.* defendants. Motion for a rehearing. Filed April 4th, 1901. Thomas Grindell, clerk. By Angie B. Parker, deputy.

233 In the Supreme Court of the Territory of Arizona.

UTTER ET AL., Plaintiff-,
vs.
FRANKLIN ET AL., Defendants.

Memorandum on Findings of Fact and Judgment.

The findings presented by defendants were prepared with scrupulous regard to the evidence, and it is respectfully submitted that the statement of plaintiffs that our findings are contrary to the weight of the evidence is wholly erroneous. There is not one finding or any part of any finding that is not based directly on the evidence, and there is nothing in the findings that is not material according to respondents' theory of the case. It would seem to be manifestly just that all facts which respondents deem to be material should be incorporated in the findings for the benefit of the appellate court. Nor is it true, as we submit that to adopt these

findings would be inconsistent with the decision of the court, and this is true as above stated, because the findings fully and honestly represent the substance of the evidence. Plaintiffs attempt to get the court to find as a fact, that the bonds were *exchanged in good faith*, etc. We submit that the facts should be found and that the question of good faith is a legal
234 conclusion from the facts, and is properly incorporated in the judgment of the court rather than in the findings of fact. The findings of plaintiffs are worded as it seems to us with the idea of preventing respondents from having any benefit at all from the evidence. If the court fails to embody the facts in its findings but finds only a conclusion of law, there will be nothing for the appellate court to pass on as to whether the conclusion of law is justified by the findings.

If respondents findings are taken and compared with the abstract of the evidence it will be seen that they follow the evidence and contain nothing not set out in the evidence and that they contain a summary of all the evidence. On reading the findings submitted by plaintiffs it seemed to the undersigned that if they were adopted, they would pretty effectually cut off respondents from any benefit in the appellate court based on the facts of this case.

As to the judgment. Plaintiffs ask for interest on interest on the coupons. These bonds and coupons up to the date of the refunding act of 1896 were void and worthless. Pima county did not up to that time owe anything, and the treasurer could have been enjoined under the decision in Lewis *v.* Pima County from paying any of the coupons. Under this state of the law it seems to be clearly manifest that interest cannot be charged on coupons which themselves could not be paid. Interest is chargeable on obligations which are valid and past due, but none of these coupons were valid obliga-
235 tions until the curative act of 1896. For this reason we submit that it would not be lawful to allow any interest at any rate before 1896. If interest were allowed on these coupons on the theory that they were due, then on the same theory they would be barred by the statute of limitations.

Respectfully submitted.

ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al.*, plaintiffs, *vs.* B. J. Franklin *et al.*, respondents. Memorandum on findings of fact. Filed May 31, 1901, Thos. Grindell, clerk.

236 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
BENJAMIN J. FRANKLIN ET AL., Respondents. } Motion to Reform Judgment.

Come now respondents herein, by their counsel, and move the court to reform and modify its judgment herein so that there shall

be funded only the bonds proved to be owned by the plaintiffs herein, to wit: eleven bonds owned by J. L. Utter and thirty bonds owned by Elizabeth B. Voorhees, and in support of this motion respondents show to the court that all the bonds herein sought to be funded were at the solicitation of the firm of Coler & Co. placed in the hands of said firm under letters of authority as follows; as shown by the testimony herein:

Messrs. W. N. Coler & Co., New York city.

GENTLEMEN: We herewith enclose you bonds No. — amounting to $— with full authority to deal with them in the same manner as all other bonds of said issue, placed in your hands and with authority to change the form of said indebtedness in such manner as you deem to the best interest of all the bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportionate share of any
237 and all expenses incurred by you in connection with this matter, it being understood however that nothing in this shall be construed as an obligation upon our part to assume any expense whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

Yours truly,

And respondents further represent in support of this motion that all of the one hundred and fifty bonds and coupons were accordingly placed in the hands of Coler & Co. under this authority.

And respondents further submit in support of this motion that the said agreement between the bondholders and Coler & Co. was one whereby said Coler & Co. agreed to defray all the expenses connected with said bonds and the holders of said bonds were not to defray any of said expenses in the event of a failure to secure a settlement of such indebtedness, and that such agreement upon the part of Coler & Co. was illegal and void, and that neither Coler & Co. or James L. Utter or Elizabeth B. Vorhies acquired by virtue of said agreement or otherwise any title to any of said bonds not individually owned by them on which they could bring this action.

Wherefore, respondents move.

ROCHESTER FORD,
Of Counsel for Respondents.

(Endorsed:) No. 546. In supreme court, Territory of Arizona. James L. Utter *et al.*, petitioners, *vs.* B. J. Franklin *et al.*, respondents. Motion to reform judgment. Filed June 1st, 1901. Thos. Grindell, clerk. Copy of this motion acknowledged June 1, 1901. B. & M., att'y- for petitioners.

238 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, WESLEY ALbright and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, Petitioners,
against
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Defendants. } Order.

This cause coming on further to be heard; and the plaintiffs and petitioners appearing by William H. Barnes, their attorney, and the Loan Commissioners of the Territory of Arizona, to wit: N. O. Murphy, governor; George W. Vickers, auditor; and Charles H. Akers, secretary, appearing by Charles F. Ainsworth, attorney general, and the said cause having been argued by the respective counsel for the petitioners and defendants, and submitted to the court upon the petition for writ of mandamus filed herein on or about the 31st day of December, 1896, and Exhibit A thereto attached, and the answer and response to the said petition filed herein on or about the 19th day of January, 1897, and the demurrer to the second defense of the said defendants in said answer and response, which de-
239 murrer was filed herein on or about the 19th day of January, 1897, and upon all the proceedings in this cause, including the mandate of the Supreme Court of the United States, and the court having considered the same, and being fully advised in the premises, it is

Considered, ordered and adjudged that the said plaintiffs and petitioners, to wit: the said James L. Utter, and the said George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, are entitled to a writ of mandamus as in said petition prayed; and that by law it is the duty of the defendants, the said Loan Commissioners to provide for redeeming and refunding of the said county indebtedness, and to issue the bonds of the Territory for said indebtedness in redemption of the said county bonds, coupons and interest; and that on the 12th day of December, 1896, the plaintiffs and petitioners made demand on the loan commissioners of the Territory of Arizona to issue bonds as provided by law in exchange for said county bonds, coupons and interest as aforesaid, with which demand the said loan commissioners unjustly refused to comply, to the injury of the said plaintiffs and petitioners, as appears by the said petition and Exhibit A thereto and the proceedings in this cause.

Further considered, ordered and adjudged that a peremptory writ of mandamus do issue, directed to N. O. Murphy, governor; George W. Vickers, auditor; and Charles H. Akers, secretary; the
240 present loan commissioners of the Territory of Arizona, being successors in office to respondents Franklin, Leitch and Bruce, and their successors in office as such loan commissioners, commanding them, upon the tender by the plaintiffs of the $150,000.00 of

bonds of the county of Pima described in the said petition, bearing date on or about the 1st day of July 1883, with the coupons then thereto attached, to make, issue and deliver to the said petitioners negotiable coupon bonds (or to their attorney), of the Territory of Arizona as provided in the acts of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 5th, 1890; also the act of Congress, entitled "An act to amend an act entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890," approved July 13, 1892; also the act of Congress, entitled "An act to amend section 15 of an act approving with amendments the funding act of Arizona, approved June 25, 1890," approved August 3, 1894; also the act of Congress, entitled "An act amending and extending the provisions of an act of Congress, entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894," approved June 6, 1896; such bonds to be made, issued and delivered to the petitioners or their attorney in exchange for the said $150,000 of bonds of the county of Pima described in said petition, and for the accrued and unpaid interest thereon, upon
241 the surrender of the said bonds and all unpaid coupons thereto attached, or for so many of said bonds and interest as shall be offered to the loan commissioners by the petitioners or their attorney.

Dated March 22, 1901.

WEBSTER STREET,
Chief Justice.
RICHARD E. SLOAN,
Associate Justice.
FLETCHER M. DOAN,
Associate Justice.
GEO. R. DAVIS,
Associate Justice.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. Jas. L. Utter, *et al.*, *vs.* Loan Commissioners. Judgment. Recorded Book 4, page- 550–552. Filed June 1, 1901, Thos. Grindell, clerk.

242 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased,
v.
BENJAMIN J. FRANKLIN.
} Assignment of Errors.

Come now the defendants and appellants, N. O. Murphy, C. H. Akers and J. W. Vickers and The Loan Commissioners of the Territory of Arizona, by Hon. C. F. Ainsworth, attorney general of Ari

zona, their attorney, and say that in the record and proceedings in the above-entitled cause there is manifest — in this to wit:

I.

That the loan commission of Arizona had been abolished by act No. 32 of the Twentieth Legislative Assembly of the Territory of Arizona, which became a law on March 13, 1899, prior to the judgment herein, and that at the date of such judgment there was no loan commission and no loan commissioners against whom any judgment could be rendered or enforced.

II.

That before the rendition of the judgment herein, of the original defendants herein, Benjamin J. Franklin had departed this life, and the other defendant-, C. M. Bruce and C. P. Leitch had long
243 since ceased to be secretary and auditor, respectively, of the Territory of Arizona.

III.

That N. O. Murphy, C. H. Akers and J. W. Vickers, who are now the governor, secretary and auditor of the Territory of Arizona, were never made parties to this proceeding, and that the judgment against them, as loan commissioners, is erroneous, because the said loan commission was abolished on March 13, 1899, and that it has not been in existence since that day, and said N. O. Murphy, C. H. Akers and J. W. Vickers have not been loan commissioners since the said date.

IV.

That the court erred in holding that the bonds and coupons sought to be funded herein were sold or exchanged in good faith.

V.

That the court erred in holding that there was not a failure of consideration as to the bonds and coupons sought to be funded herein, and in not holding that the failure to build, complete and operate the Arizona Narrow Guage Railroad Company, to which company said bonds and coupons were issued, was a failure of consideration as to the bonds and coupons so issued by Pima county and sought to be funded herein.

VI.

That the court erred in not sustaining defendants' plea of
244 the statute of limitations to the coupons sought to be funded herein.

VII.

That the court erred in allowing interest on the coupons funded herein.

VIII.

That the court erred in rendering judgment for plaintiffs herein, for the reason that it appears by the evidence herein that plaintiffs have no right to sue herein, except for the bonds and coupons owned by them personally, and because it further appears herein that no authority was given by the owners of the bonds, which were not owned by plaintiffs, under which plaintiffs were authorized to bring suit on any bonds not owned by them, and because the agreement by which the firm of Coler & Co. and plaintiffs undertake to carry on this litigation, and advance all costs and expenses and to save the owners of the various bonds harmless from any such costs and expenses in case of a failure to secure a settlement or enforcement of the alleged indebtedness represented by said bonds, is illegal and void and contrary to public policy and not enforce-able in the courts.

Wherefore, appellants pray that this cause be reversed and that the petition for a mandamus herein be dismissed and the petitioners take nothing by their action, and the defendants recover their costs herein, and for all proper orders in the premises.

C. F. AINSWORTH,
By ROCHESTER FORD,
Attorney General of Arizona, for Appellants.
ROCHESTER FORD,
Of Counsel.

245 (Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter *et al.* Assignment of errors. Filed June 1, 1901. Thomas Grindell, clerk.

246 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
BENJAMIN J. FRANKLIN ET AL., Respondents. } Bill of Exceptions.

Be it remembered, that on June 1, 1901, the respondents in the above-entitled cause filed their motion to reform the judgment herein, which said motion was in words and figures as follows, to wit:

In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER ET AL., Petitioners,
vs.
BENJAMIN J. FRANKLIN ET AL., Respondents. } Motion to Reform Judgment.

Come now respondents herein, by their counsel, and move the court to reform and modify its judgment herein so that there shall be funded only the bonds proved to be owned by the plaintiffs herein, to wit: eleven bonds owned by J. L. Utter and thirty bonds owned by Elizabeth B. Voorhies, and in support of this motion re-

spondents show to the court that all the bonds herein sought to be funded were at the solicitation of the firm of Coler & Co.
247 placed in the hands of said firm under letters of authority as follows; as shown by the testimony herein:

Messrs. W. N. Coler & Co., New York city.

GENTLEMEN: We herewith enclose you bonds No. — amounting to $— with full authority to deal with them in the same manner as all other bonds of said issue, placed in your hands and with authority to change the form of said indebtedness in such manner as you deem to the best interest of all the bondholders, and accept in lieu thereof such new securities as in your judgment may be best, and we also agree to pay our proportionate share of any and all expenses incurred by you in connection with this matter, it being understood however that nothing in this shall be construed as an obligation upon our part to assume any expense whatever in the event of your failure to secure a settlement or enforcement of this indebtedness.

Yours truly,

And respondents further represent in support of this motion that all of the one hundred and fifty bonds and coupons were accordingly placed in the hands of Coler & Co. under this authority.

And respondents further submit in support of this motion that the said agreement between the bondholders and Coler & Co. was one whereby said Coler & Co. agreed to defray all the expenses connected with said bonds and the holders of said bonds were
248 not to defray any of said expenses in the event of a failure to secure a settlement of such indebtedness, and that such agreement upon the part of Coler & Co. was illegal and void, and that neither Coler & Co. or James L. Utter or Elizabeth B. Voorhies acquired by virtue of said agreement or otherwise any title to any of said bonds not individually owned by them on which they could bring this action.

Wherefore, respondents move.

ROCHESTER FORD,
Of Counsel for Respondents.

And thereafter, to wit: on the said first day of June, 1901, said motion came on for hearing and was submitted by counsel for the respective parties, and thereupon taken under advisement by the court, and thereafter, to wit: on said June 1, 1901, the court being fully advised in the premises did deny and overrule said motion, to which action of the court in denying and overruling said motion respondents, by their counsel, then and there instantly excepted.

And in order that the said motion and the ruling of the court thereon may be made part of the record, respondents on this the said first day of June, 1901, tender this their bill of exceptions and pray that the same may be signed, sealed and made part of the record, and the said bill of exceptions being exhibited to the counsel

for petitioners herein, and found to be correct is so signed,
249 sealed and made part of the record herein, this June 1, 1901.

WEBSTER STREET, [SEAL.]
Chief Justice of the Supreme Court
of the Territory of Arizona.

The foregoing bill of exceptions is correct.

BARNES,
Attorney for Petitioners.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al.* petitioners, *vs.* B. J. Franklin, *et al.*, respondents. Bill of exceptions. Filed June 1st, 1901. Thomas Grindell, clerk.

250 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, *vs.* BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.	Motion for Allowance of Appeal.

Now come N. O. Murphy, C. H. Akers and J. W. Vickers, by their attorney, Hon. C. F. Ainsworth, attorney general of Arizona, and also N. O. Murphy, governor, C. H. Akers, secretary and J. W. Vickers auditor of the Territory of Arizona, and personally and also officially, as constituting the loan commissioners of the Territory of Arizona (if said board of commissioners is in existence), as such board of commissioners and as such loan commissioners, appealing as and for such board of commissioners, give notice of appeal in this cause and ask that said notice be entered upon the minutes of this court.

Said appellants personally and officially, as such board of commissioners, pray that this court grant an appeal from its judgment rendered this 22nd day of March, 1901, to the Supreme Court of the United States, upon their giving, executing and filing with the clerk of this court a bond, to be approved according to law, in the
251 penal sum of one thousand dollars.

C. F. AINSWORTH,
Attorney General of the Territory of Arizona,
for all said Appellants.
ROCHESTER FORD,
Of Counsel for said Appellants.

(Endorsed:) No. 546. In supreme court, Territory of Arizona. James L. Utter, *et al.*, plaintiffs, *vs.* Benjamin J. Franklin, *et al.*, defendants. Motion for allowance of appeal. Filed June 1st, 1901. Thomas Grindell, clerk.

252 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs, vs. BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.	Application for and Allowance of Appeal.

Whereas, in the above-entitled cause the supreme court of the Territory of Arizona did on the 22nd day of March, 1901, render judgment that N. O. Murphy, C. H. Akers and J. W. Vickers, then and there respectively the governor, secretary and auditor of the Territory of Arizona, are the loan commissioners of the Territory of Arizona, and did further order, adjudge and decree that they as such loan commissioner should fund the bonds and coupons set out in the petition in this cause, and the said N. O. Murphy, C. H. Akers and J. W. Vickers, conceiving themselves aggrieved by such final judgment, holding that they are loan commissioners, and said N. O. Murphy, governor, C. H. Akers, secretary, and J. W. Vickers, auditor of the Territory of Arizona, constituting said loan commissioners (if said board of commissioners is in existence) conceiving themselves as such board of commissioners and as such loan commissioners aggrieved by such final judgment, do for themselves and also
253 officially, as such board of commissioners, and as such loan commissioners, as and for such board of loan commissioners, appeal from said order and judgment to the Supreme Court of the United States, and pray that this their appeal from said order and judgment may be allowed, and that a transcript of the record upon which said order and judgment were made duly authenticated, may be sent to the Supreme Court of the United States.

C. F. AINSWORTH,
Attorney General of the Territory of Arizona, for all said Appellants.
ROCHESTER FORD,
Of Counsel for said Appellants.

And now, to wit: on the 1st day of June, 1901, it is ordered that the appeal be allowed as prayed for above upon appellants executing and filing with the clerk of this court within thirty days from the date hereof a bond in the penal sum of one thousand ($1,000.00) dollars to be approved according to law.

WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 546. In supreme court, Territory of Arizona James L. Utter, *et al. v.* Benjamin J. Franklin, *et al.* Application — and allowance of appeal. Filed June 1st, 1901. Thomas Grindell, clerk.

254 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. McGinnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.
} Assignment of Errors.

Come now the appellants herein, by their counsel, and allege that in the record and proceedings in the above-entitled cause there is manifest error in this to wit:

The findings of fact as found by the court herein are insufficient to support the judgment, and the judgment and decision are contrary to law for the reason that it fully appears from said findings of fact that the bonds and coupons sought to be funded herein were not sold or exchanged in good faith in accordance with the act of the legislature of Arizona, approved February 21, 1883, under which act said bonds and coupons were issued.

Appellants therefore pray that this cause be reversed and that the petition herein be dismissed and that such judgment be rendered as justice requires.

255 C. F. AINSWORTH,
By ROCHESTER FORD,
Attorney General of Arizona, for Appellants.
ROCHESTER FORD,
Of Counsel.

(Endorsed:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter, *et al. vs.* B. J. Franklin, *et al.* loan commissioners. Assignment of errors. Filed June 24, 1901. Thos. Grindell, clerk.

256 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.
} Bond on Appeal.

Know all men by these presents: That we, N. O. Murphy, C. H. Akers and J. W. Vickers, and N. O. Murphy, governor, C. H. Akers,

secretary, and J. W. Vickers, auditor of the Territory of Arizona, constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, as such loan commissioners, and as and for and on behalf of such board of commissioners, as principals, and Barron M. Jacobs and H. B. Tenney, as sureties, are held and firmly bound unto James L. Utter and George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, in the penal sum of one thousand ($1,000.00) dollars, lawful money of the United States of America, to be paid to the said appellees, for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by
257 these presents.

Signed and sealed this 6th day of June, 1901.

The condition of the foregoing bond is such that, whereas, said N. O. Murphy, C. H. Akers and J. W. Vickers, and said N. O. Murphy, governor, C. H. Akers, secretary, and J. W. Vickers auditor of the Territory of Arizona, constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, as such loan commissioners, as and for and on behalf of such board of commissioners, have taken and have been allowed an appeal to the Supreme Court of the United States from a final judgment rendered in the above-entitled cause on March 22, 1901, in favor of the appellees and plaintiffs herein.

Now if said appellants shall prosecute their appeal to effect, and if they fail to make their plea good, shall answer all costs and damages, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

N. O. MURPHY,
C. H. AKERS, AND
J. W. VICKERS, [SEAL.]
By C. F. AINSWORTH,
Attorney General of Arizona, Their Attorney.

N. O. MURPHY, *Governor,*
C. H. AKERS, *Secretary, and*
J. W. VICKERS,
Auditor, of the Territory of Arizona,
Constituting the Board of Commissioners, Styled the Loan Commissioners of the Territory of Arizona, as Such Loan Commissioners, as and for and on Behalf of Such Board of Commissioners, [SEAL.]
258 By C. F. AINSWORTH,
Attorney General of Arizona, Their Attorney.

BARRON M. JACOBS. [SEAL.]
H. B. TENNEY. [SEAL.]

UNITED STATES OF AMERICA, }
Territory of Arizona, County of Pima, } ss:

Barron M. Jacobs and H. B. Tenney, being severally duly sworn, depose and say, each for himself and not one for the other, that he

is a resident and freeholder within the Territory of Arizona, and that he is worth at least the sum of one thousand dollars, for which he has become surety upon the above-entitled bond, over and above his just debts and liabilities, and exclusive of property exempt from execution.

BARRON M. JACOBS.
H. B. TENNEY.

Subscribed and sworn to before me this 6th day of June, 1901.
[SEAL.] WILEY E. TUSSING,
Notary Public, Pima County, Arizona.

My commission expires April 18, 1905.

259 The foregoing bond is satisfactory to me.
W. H. BARNES,
Attorney for Plaintiffs and Appellees.

The foregoing bond is hereby approved this 24th day of June, 1901.
[COURT SEAL.] WEBSTER STREET,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) No. 546. In the supreme court, Territory of Arizona. James L. Utter, *et al.*, *v.* Benjamin J. Franklin *et al.* Bond on appeal. Filed June 24, 1901. Thos. Grindell, clerk.

260 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and GEORGE ALBRIGHT, Wesley Albright, and William H. Maginnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. Bruce, Loan Commissioners of Arizona, Defendants.
} Affidavit of Value.

TERRITORY OF ARIZONA, *County of Pima*, } *ss:*

Rochester Ford, of lawful age, being duly sworn according to law, makes oath and says: That he is one of the attorneys for the defendants in the above-entitled cause, and that he is cognizant of the amount involved therein, and that the matter in dispute, exclusive of costs, exceeds the sum of five thousand ($5,000.00) dollars, and also exceed- the sum of one hundred and eighty thousand ($180,000.00) dollars.

ROCHESTER FORD.

Subscribed and sworn to before me this 11th day of June, 1901.
[SEAL.] WILEY E. TUSSING,
Notary Public in and for said County and Territory.

My commission expires April 18, 1905.

(Endorsed:) No. 546. In supreme court, Territory of Arizona. James L. Utter, *et al.* v. Banjamin J. Franklin, *et al.* Affidavit of value. Filed June 24, 1901, Thomas Grindell, clerk.

261 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Petitioners,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of the Territory of Arizona, Defendants. } No. 546.

Be it remembered that on Thursday, June 1st, 1899, that being a regular judicial day of the January term, 1899, of said court, the following record of this case for this day was made, to wit:

Title of Cause.

In this cause it appearing that a mandate of the Supreme Court of the United States, reversing the judgment of this court in this cause and appealed from, has been filed in the office of the clerk of this court. And the motion of Wm. H. Barnes, attorney for the petitioners in above case, filed herein, in accordance with, and pursuant to, the proceedings of the Supreme Court of the United States as appears in the mandate, suggested the death of Elizabeth B. Voorhies, and moved that George Albright, Wesley Albright
262 and William Maginnis, as executors of the last will and testament of said deceased, be substituted for that of deceased, and he also moved for a writ of mandamus as prayed for in the petition directed to the loan commissioners of Arizona, the court ordered said motion submitted and further ordered that the hearing of said motion be set for June 2nd, at 10 o'clock a. m., on oral argument.

On Friday, June 2nd, 1899, that being a regular judicial day of the January term, 1899, of said court, the following record in this case was made this day, to wit:

Title of Cause.

On motion of Mr. C. W. Wright, it was ordered that Mr. Rochester Ford's name be entered as one of counsel for respondents in this cause.

(A recess was then taken by the court until 2 o'clock p. m.)

Two o'clock court reconvened, and the following orders were made, to wit:

Title of Cause.

In this cause, the motion for mandate to be issued to lower court, came on to be heard and was argued by Mr. W. H. Barnes for petitioners and Mr. C. W. Wright and Rochester Ford for respondents, and cause ordered submitted.

It is further ordered by the court that the respondents have
263 10 days to file briefs on said motion, and the petitioners have the required time thereafter to file their reply.

On Wednesday, November 1st, 1899, that being a regular judicial day of the October term, 1899, of said court, the following record was made in this case for this day, to wit:

Title of Cause.

In this cause it is ordered that the motion to substitute the executors of the last will and testament of Elizabeth B. Voorhies, one of the plaintiffs in the case, in accordance with the order of the Supreme Court of the United States, be and the same is hereby granted.

It is further ordered that respondents be granted permission to file an amended return and answer.

It is further ordered that petitioners be granted leave to file reply to the answer of respondents.

The following record was also made on Wednesday, November 1st, 1899, to wit:

Title of Cause.

Upon motion of W. H. Barnes, Esq., Mr. C. W. Wright stated he appeared as attorney for the respondents in this case.

Mr. Wright asked that this case be referred to some court to take the testimony and determine the questions of fact involved, and report same to this court. The court suggested that an application
264 be formally filed for some proceedings to be taken to try the issues of fact in the case. Counsel stated the issues were not fully made up yet, and the court stated that until the issues are finally made up the court cannot act.

On Tuesday, January 9th, 1900, that being a regular judicial day of the January term, 1900 of said court, the following record in this case was made for this day, to wit:

Title of Cause.

On motion of Mr. W. H. Barnes, attorney for petitioners, it is ordered that this cause be passed until tomorrow morning, Jan. 10th, 1900.

On Friday, January 12th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record was this day made in this case, to wit:

Title of Cause.

Mr. W. H. Barnes, attorney for petitioners, moves the court to set cause for trial. Mr. Rochester Ford moves that this cause be referred to the district court of the first judicial district, in and for Pima county, and tried before a jury. Whereupon the court ordered the respective motions to be submitted for consideration.

264½ On Tuesday, January 16th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made this day, to wit:

Title of Cause.

In this cause, it is ordered that the motion of respondents, for cause to be referred to the district court of Pima county for jury trial, be and the same is hereby denied.

It is further ordered that Mr. Clinton D. Hoover be appointed referee to take evidence in the Territory, and that he have until Monday, March 26th to take said evidence, and cause ordered set for hearing March 26th, in this court.

On Monday, March 26th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was this day made, to wit:

Title of Cause.

On motion of Attorney General Ainsworth, it is ordered that he have permission to file motion to dismiss.

The following record in this case was also made on Monday, March 26th, 1900, to wit:

Title of Cause

The motion of respondents for continuance, filed herein, was ordered submitted.

265 On Tuesday, March 27th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made for this day, to wit:

Title of Cause.

It is ordered that the motion for continuance, filed herein by respondents, and heretofore submitted, be granted, and the cause continued until June first.

It is further ordered that the motion to dismiss, filed herein by respondents be held in abeyance until cause comes on regularly for hearing.

On Friday, June 1st, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made this day, to wit:

Title of Cause.

It is ordered that W. H. Barnes, Esq., have until 2 o'clock this afternoon to read affidavits of C. W. Wright and Rochester Ford, filed herein.

(A recess was then taken by the court until two o'clock p. m.)

Two o'clock p. m. court reconvened, and the following record in this case was made, to wit:

Title of Cause.

It is ordered that this cause be submitted on briefs, allowing petitioners 30 days in which to complete evidence, and respondents 60 days thereafter.

266 On motion of W. H. Barnes Esq., attorney for petitioners herein; it is ordered that he be allowed to take to Tucson report of referee C. D. Hoover.

On Saturday June 2nd, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case was made this day, to wit:

Title of Cause.

It is ordered that the motion for security for costs, filed herein by respondents, be and the same is hereby denied.

On Friday March 22nd, 1901, that being a regular judicial day of the January term, 1901 of said court, the following record was made in this case this day, to wit:

Title of Cause.

This cause having been heretofore submitted, and by the court taken under consideration and the court having considered the same and being fully advised in the premises: It is ordered that the writ of mandate prayed for, requiring the loan commissioners to fund the bonds in question, together with the interest due thereon under the provisions of the act of June 25, 1890, issue.

267 It is further ordered, adjudged and decreed that the plaintiffs herein, James L. Utter and George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, do have and recover of and from the defendants herein their costs in this court taxed at — dollars.

On Saturday March 23rd, 1901, that being a regular judicial day of the January term, 1901 of said court, the following record in this case was made this day, to wit:

Title of Cause.

On motion of Attorney General Ainsworth, it is ordered that attorney for respondents have 10 days in which to file counter-statement.

On Saturday June 1st, 1901, that being a regular judicial day of the January term, 1901 of said court, the following record in this case was this day made, to wit:

Title of Cause.

It is ordered that the motion for rehearing filed herein by respondents, also motion to reform and modify judgment, be submitted.

The following record in this case was also made on Saturday, June 1st, 1901, to wit:

Title of Cause.

268 The motion for rehearing filed herein by respondents having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that said motion be and the same is hereby denied.

It is further ordered that the motion to reform and modify judgment be denied.

And also the following record was made in this case on Saturday, June 1st, 1901, to wit:

Title of Cause.

Hon. C. F. Ainsworth, attorney general of the Territory of Arizona, as attorney for N. O. Murphy, C. H. Akers and G. W. Vickers, and also, as attorney for said N. O. Murphy, governor, C. H. Akers, secretary, and G. W. Vickers, auditor of the Territory of Arizona, constituting the loan commissioners of the Territory of Arizona (if such loan commissioners are in existance) herein, in open court, on this first day of June, 1901, being one of the regular judicial days of the January term, 1901, of the supreme court of Arizona, gave notice of appeal for said N. O. Murphy, C. H. Akers and G. W. Vickers, and for said loan commissioners, acting officially, as and for the board of commissioners, styled the loan commissioners of the Territory of Arizona, to the Supreme Court of the United States, and prayed for an allowance of such appeal, whereupon it was ordered by the court that an appeal be granted as prayed for to the Supreme
269 Court of the United States from the order and judgment of this court upon said appellants filing with the clerk of this court a bond in the sum of one thousand dollars, approved according to law.

And also the following record was made in this case on Saturday, June 1st, 1901, to wit:

Title of Cause.

An appeal having been prayed for and allowed herein from the order and judgment of this court in the above-entitled cause to the Supreme Court of the United States, the court doth now, under the provisions of section 1868, of the Revised Statutes of the United States, make and certify, on such appeal, a statement of the facts of the case, in the nature of a special verdict, and doth cause the same to be filed herein this day.

270 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona,* } ss:

I, Thomas Grindell, clerk of the supreme court of the Territory of Arizona, by virtue of the foregoing appeal, and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 269, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of James L. Utter and George Albright, Wesley Albright and William H. Maginnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased, plaintiffs, against Benjamin J. Franklin, C. P. Leitch and C. M. Bruce, loan commissioners of the Territory of Arizona, defendants, with the exception of the depositions, and testimony taken by the commissioner, as the same remain of record and on file in said office.

Also that the citation attached hereunto, is the original citation issued by said supreme court of the Territory of Arizona.

Seal Supreme Court of Arizona.

In testimony whereof, I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed at the city of Phœnix, in the Territory of Arizona, this 19th day of July, 1901.

THOMAS GRINDELL,
Clerk of the Supreme Court of the Territory of Arizona.

271 In the Supreme Court of the United States.

JAMES L. UTTER and GEORGE ALBRIGHT, WESLEY ALBRIGHT, and William H. McGinnis, as Executors of the Last Will and Testament of Elizabeth B. Voorhies, Deceased, Plaintiffs,

vs.

BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of the Territory of Arizona, Defendants.

UNITED STATES OF AMERICA, *ss:*

To James L. Utter and George Albright, Wesley Albright, and William H. McGinnis, as executors of the last will and testament of Elizabeth B. Voorhies, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within sixty days from the date hereof pursuant to an appeal allowed by the honorable chief justice of the supreme court of Arizona, on the first day of June, 1901, from a judgment rendered in the supreme court of the Territory of Arizona on the 22d day of March, 1901, in favor of the plaintiffs in the above-entitled action, in which appeal the above-named plaintiffs are appellees and N. O. Murphy, C. H. Akers and J. W. Vickers, and N. O. Murphy governor, C. H. Akers, secretary

and J. W. Vickers, auditor of the Territory of Arizona, constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, as such loan commissioners and as and for and on behalf of such board of commissioners, are appellants, to show cause, if any there be, why the said judgment in your favor should not be corrected and reversed and speedy justice should not be done to the parties in whose behalf said appeal is allowed.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of June, 1901.

Seal Supreme Court of Arizona.

WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

[Endorsed:] No. 546. In the supreme court of the Territory of Arizona. James L. Utter *et al.*, *vs.* B. J. Franklin *et al.*, loan commissioners. Citation. Filed June 24, 1901 Thos. Grindell clerk. Service of a copy of the within citation is hereby acknowledged on behalf of each plaintiff and appellee and their appearance entered in said cause in the Supreme Court of the United States. Wm. H. Barnes, attorney for plaintiffs.

Endorsed on cover: File No. 18,241. Arizona Territory supreme court. Term No. 388. N. O. Murphy, C. H. Akers & J. W. Vickers personally and as governor, secretary & auditor of the Territory of Arizona, respectively constituting the board of commissioners, styled the loan commissioners of the Territory of Arizona, appellants, *vs.* James L. Utter, & George Albright, Wesley Albright & William H. Maginnis as executors of Elizabeth B. Voorhies, deceased. Filed July 29, 1901.